CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 31 AUGUST 6, 1997 NO. 32

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 97-65)

EXTENSION OF INSPECTORATE AMERICA CORPORATION'S CUSTOMS GAUGER APPROVAL & LABORATORY ACCREDITATION TO THE NEW SITE LOCATED IN PORT EVERGLADES, FLORIDA

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of the extension of Inspectorate America Corp.'s Customs gauger approval and laboratory accreditations to include its Port Everglades, FL facility.

SUMMARY: Inspectorate America Corp., of Houston, TX, a Customs approved gauger and accredited laboratory under Section 151.13 of the Customs Regulations (19 CFR 151.13), has been given an extension of its Customs gauger approval and laboratory accreditations to include the Port Everglades, FL site. Specifically, this site has been given Customs approval under Part 151.13(a)(1) of the Customs Regulations to gauge petroleum and petroleum products, organic chemicals in bulk and liquid form and animal and vegetable oils in all Customs districts; and accreditation to perform the following tests as listed under Part 151.13(a)(2): API gravity, distillation characteristics, vapor pressure, sediment, viscosity and percent by weight sulphur.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Part 151 of the Customs Regulations provides for the acceptance at Customs Districts of laboratory analyses and gauging reports for certain products from Customs accredited commercial laboratories and approved gaugers. Inspectorate America Corp., a Customs commercial approved gauger and accredited laboratory, has applied to Customs to extend its Customs gauger approval and laboratory accreditation to its Port Everglades, FL facility. Review of the qualifications of the site shows that the extension is warranted and, accordingly, has been granted.

Location

Inspectorate America Corp.'s site is located at 801 S.E. 28th Street, Port Everglades, FL 33316.

EFFECTIVE DATE: June 3, 1997.

FOR FURTHER INFORMATION CONTACT: Marcelino Borges, Senior Science Officer, Laboratories and Scientific Services, U.S. Customs Service, 1301 Constitution Ave., NW, Washington, D.C. 20229 at (202) 927–1060.

Dated: July 7, 1997.

GEORGE D. HEAVEY,
Director,
Laboratories and Scientific Services.

[Published in the Federal Register, July 24, 1997 (62 FR 39987)]

U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, July 22, 1997.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF SLEEPWEAR

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of sleepwear. Comments are invited on the correctness of the proposed ruling.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after October 6, 1997.

FOR FURTHER INFORMATION CONTACT: John Elkins, Textiles Branch (202) 482–7050.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On April 9, 1997, Customs published a notice in the CUSTOMS BULLETIN, Volume 31, Number 15, proposing to revoke NY A80370, dated March 13, 1996. One comment was received from Customs New York.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act Pub. L. 103–182, 107 Stat. 2057, 2186 (1993)), this notice advises interested parties that Customs is revoking NY A80370 to reflect proper classification of the sleepwear in subheadings 6107.21.0010 of the Harmonized Tariff Schedule of the United States Annotated, which provides for men's knitted pajamas, of cotton, and 6107.91.0030, which provides for men's other knitted sleepwear. HQ 959084, revoking NY A80370, is set forth in the Attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: July 18, 1997.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, July 18, 1991.

CLA–2 RR:TC:TE 959084 CAB
Category: Classification
Tariff No. 6107.21.0010 and 6107.91.0030

ALLAN H. KAMNITZ, ESQ.
SHARRETTS, PALEY, CARTER & BLAUVELT, PC.
Sixty-seven Broad Street
New York, NY 10004

Re: Reconsideration of NY A80370, dated March 13, 1996; sleepwear vs. outerwear; Heading 6107; Heading 6103; Heading 6110.

DEAR MR. KAMNITZ:

This is in response to your inquiry of March 25, 1996, requesting reconsideration of New York Ruling Letter (NY) A80370, dated March 13, 1996, regarding the tariff classification certain men's garments pursuant to the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Your request is on behalf of Cypress Apparel Group. Customs has reexamined the decision and determined that the decision was in error. Customs believes NY A80370 should be revoked to reflect the correct tariff classification in subheadings 6107.21.0010 and 6107.91.0030, HTSUSA. Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of NY A80370 was published on April 9, 1997, in the CUSTOMS BULLETIN, Volume 31, Number 15.

Facts:

The garments at issue are comprised of Styles 75042T, 85012T, and 95002T which are comprised of identical fabric. Style 75042T is a man's pullover garment constructed of 100

percent cotton knit jersey material. The garment contains a rib knit crew neckline, a V-shaped insert at the front neckline, short sleeves, an embroidered logo located on the left chest area, a triangular sweat patch at the back neckline, and a hemmed bottom with side slits. Style 85012T is a pair of men's pull-on pants made of 100 percent cotton knit jersey fabric. The pants contain an exposed jacquard elastic waistband, a one button fly front opening, two side seam pockets, and hemmed leg openings. The jacquard waistband depicts the words "Tommy Hilfiger". Style 95002T is a pair of men's pull-on shorts made of 100 percent cotton knit jersey fabric. The shorts contain an exposed jacquard elastic waistband, a one button fly front opening, two side seam pockets, and hemmed leg opening with side slits. The jacquard waistband contains the words "Tommy Hilfiger".

In NY A80370, Style 75042T was classified in subheading 6110.20.2065, HTSUSA, which is the provision for men's cotton knit pullovers, other, other; Style 85012T was classified in subheading 6103.42.1020, HTSUSA, which provides for men's cotton knit trousers; and Style 95002T was classified in subheading 6103.42.1050, which is the provision for men's cotton knit shorts.

Issue:

Whether the subject merchandise is classifiable as sleepwear under Heading 6107, HTSUSA, or as outerwear garments under Headings 6110 and 6103, HTSUSA?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's taken in order.

Heading 6107, HTSUSA, provides for, among other things, men's knitted nightshirts, pajamas and similar articles. Customs has consistently ruled that pajamas are generally two piece garments worn for sleeping. One piece garments used for sleeping may be classifiable as pajamas, but such garments must cover the entire torso. Other one piece garments used for sleeping are not classifiable as pajamas, instead, they fit into a residual provision within Heading 6107, HTSUSA, for similar articles. Garments classified in this residual provision include sleep shorts and sleep pants.

In determining the classification of garments submitted to be sleepwear, Customs considers the factors discussed in several court cases that dealt with sleepwear. In *Mast Industries, Inc. v. United States*, 9 CIT 549, 552 (1985), *aff'd* 786 F.2d 144 (CAFC, April 1, 1986), the Court of International Trade considered the classification of a garment claimed to be sleepwear. The court cited several lexicographic sources, among them *Webster's Third New International Dictionary* which defined "nightclothes" as "garments to be worn to bed." In *Mast*, the court determined that the garment at issue therein was designed, manufactured, and used as nightwear and therefore was classifiable as nightwear. Similarly, in *St. Eve International, Inc. v. United States*, 11 CIT 224 (1987), the court ruled the garments at issue therein were manufactured, marketed and advertised as nightwear and were chiefly used as nightwear. Finally, in *Inner Secrets/Secretly Yours Inc. v. United States*, 885 F. Supp. 248 (1995), the court was faced with the issue of whether women's boxer-style shorts were classifiable as "outerwear" under Heading 6204, HTSUSA, or as "underwear" under Heading 6208, HTSUSA. The court stated the following, in pertinent part:

> [P]laintiff's preferred classification is supported by evidence that the boxers in issue were designed to be worn as underwear and that such use is practical. In addition, plaintiff showed that the intimate apparel industry perceives and merchandises the boxers as underwear. While not dispositive, the manner in which plaintiff's garments are merchandised sheds light on what the industry perceives the merchandise to be. Plaintiff also established that it is considered an underwear resource, that the Hong Kong factory which manufactured its merchandise does not produce outerwear * * *. Further, evidence was provided that plaintiff's merchandise is marketed as underwear. While advertisements also are not dispositive as to correct classification under the HTSUS, they are probative of the way that the importer viewed the merchandise and of the market the importer was trying to reach.

You assert that the subject garments are sleepwear and should be classified as sleepwear under Heading 6107, HTSUSA. You maintain that the overall construction of the garments, including the loose-fit and the lightweight fabric construction make them particularly comfortable and suitable for sleeping. You have submitted pictures depicting the

subject merchandise in the sleepwear department in several different retail stores. You emphasize the subject garments will be purchased, marketed, and sold as pajamas or sleepwear, and that at retail a display hangtag will be affixed to the garment indicating that the garments are part of the Tommy Hilfiger sleepwear collection. In support of your position, you refer to Headquarters Ruling Letter (HQ), 957862, dated December 21, 1995 and HQ 956755, dated November 10, 1994, for the proposition that in determining whether garments are designed, manufactured and used sleepwear, Customs would look to such factors as the physical characteristics of the garment, environment of the sale, advertising and marketing, recognition in the trade of virtually identical merchandise, and documentation incidental to the purchase and sale of the merchandise. In both of the cited cases, Customs determined that lightweight loose-fitting garments coupled with design, marketing, and purchasing data which supported classification as sleepwear were classifiable as sleepwear.

In *Mast, supra,* the court noted that, "most consumers tend to purchase and use a garment in the manner in which it is marketed." In light of the cited line of court cases, in addition to the overall construction of the garments which is associated with sleepwear, the advertising and marketing data submitted which indicate that the garments are intended to be used as sleepwear, Customs agrees that the garments will be principally used as sleepwear. Thus, the subject garments are classifiable under Heading 6107, HTSUSA.

You state in your submission that retail stores intend to offer the garments for sale either as a pajamas ensemble or with just the pajama bottoms being sold. Thus, in some instances, an equal number of tops and matching bottoms are sold and in other situations, retailers are buying more bottoms than tops. It is important to note that if the matching tops and bottoms are imported together in equal numbers, they will be classified as pajamas under Heading 6107, HTSUSA. If however, unequal numbers of tops and bottoms are imported together, the odd tops or bottoms without a matching piece will be classified in the residual subheading under Heading 6107, HTSUSA, for similar articles.

Recently, in *International Home Textile Inc. v. United States,* Slip Op. 97–31, (Decided March 18, 1997) the court classified garments very similar in construction to the subject garments under Heading 6105, HTSUSA, and Heading 6103, HTSUSA, as tops and bottoms, respectively. It is important to note that the parties stipulated that the garments therein were considered "loungewear" and the issue was whether "loungewear" was classifiable as outerwear under Headings 6105 and 6103, HTSUSA, or as sleepwear under Heading 6107, HTSUSA. The court found during trial that the garments were primarily used for lounging and not for sleeping. The facts of the instant case are distinguishable from the facts of *International Home.* The importer in this instance is contending that the subject garments are primarily used for sleeping and has submitted data evidencing that the garments are designed, marketed, and sold as sleepwear. The importer does not assert that the instant garments are being worn primarily for lounging and the data that he has submitted supporting his claim that the garments are sleepwear has been instrumental in Customs determination that the subject garments are properly classifiable as sleepwear. In the absence of evidence that the subject garments are primarily worn for lounging, the decision in *International Home* is not applicable.

Holding:

Based on the foregoing, if Style 75042T is imported in equal quantities and sizes with either Style 85012T or Style 95002T, they are classified as pajamas in subheading 6107.21.0010, HTSUSA, which is the provision men's knitted pajamas, of cotton. The applicable rate of duty is 9.3 percent *ad valorem* and the textile restraint category is 351. If the bottoms are imported separately or without matching tops of corresponding quantities and sizes, the garments are classified in subheading 6107.91.0030, which provides for men's other knitted sleepwear. The applicable rate of duty is 9.1 percent *ad valorem* and the textile restraint category is 351. Customs is assuming these garments are subject to the Column 1 General rates of duty.

NY A80370 is hereby revoked.

In accordance with section 625, this ruling will become effective 60 days from its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest

that you check, close to the time of shipment, *The Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

PROPOSED REVOCATION OF RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF NON-ELECTRIC COFFEE MAKERS

AGENCY: U.S. Customs Service1 Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke one ruling and modify another ruling, both relating to the tariff classification of non-electric coffee makers. These articles are essentially heat-resistant glass carafes containing a wire mesh filter mounted on a plunger. Customs invites comments on the correctness of this proposal.

DATE: Comments must be received on or before September 5, 1997.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Tariff Classification Appeals Division, 1301 Constitution Avenue, NW. (Franklin Court), Washington, D.C. 20229. Submitted comments may be inspected at the Tariff Classification Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th. Street, N.W., Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Tariff Classification Appeals Division (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation

Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke one ruling and modify another ruling, both relating to the tariff classification of non-electric coffee makers. Customs invites comments on the correctness of this proposal.

In *HQ* 087313, dated September 4, 1990, certain non-electric coffee makers, each consisting of a glass carafe and wire mesh filter mounted on a plunger, among other steel and plastic components, were held to be classifiable as household articles of glass, specially tempered, and other than specially tempered, in subheadings 7013.39.10 and 7013.39.20, Harmonized Tariff Schedule of the United States (HTSUS), respectively. This ruling was based on a finding under GRI 3(b), HTSUS, that glass imparted the essential character to the coffee maker. *HQ* 087313 is set forth as "Attachment A" to this document.

In *NY* 894612, dated February 25, 1994, the tariff status of an electric kettle and a cafetiere, also referred to as a French press coffee maker, was in issue. The kettle was held to classifiable in subheading 8516.79.00, HTSUS, as an electrothermic appliance of a kind used for domestic purposes. The cafetiere, described as a Pyrex pot containing a strainer at the bottom of a plunger, was held to be classifiable in subheading 7013.39.60, HTSUS, as a household article of glass, other. *NY* 894612 is set forth as "Attachment B" to this document.

It is now Customs position that the non-electric coffee makers in the cited rulings are *prima facie* classifiable both in heading 8210, HTSUS, as hand-operated mechanical appliances, weighing 10 kg or less, used in the preparation, conditioning or serving of food or drink, and in heading 7013, as household articles of glass. Under GRI 3(a), HTSUS, heading 8210 is believed to be the most specific with respect to these coffee makers. *HQ* 960669 revoking *HQ* 087313 is set forth as "Attachment C" to this document. *HQ* 960670 modifying *NY* 894612 with respect to the cafetiere is set forth as "Attachment D" to this document. Before taking this action, we will give consideration to any written comments timely received.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: July 17, 1997.

MARVIN AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, September 4, 1990.

CLA–2 CO:R:C:G 087313 NLP
Category: Classification
Tariff No. 7013.39.10 and 7013.39.20

MR. E. WILLERTH
MIDWEST CUSTOM SERVICES, INC.
P.O. Box 905
631 North Central Ave.
Wood Dale, IL 60191–0905

Re: Non-electric coffee makers.

DEAR MR. WILLERTH:

This is in response to your letter of May 16, 1990, on behalf of your client, Bodum, Inc., requesting a tariff classification of non-electric coffee makers under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Samples, products of Switzerland, were submitted for our examination.

Facts:

The submitted samples are non-electric coffee makers varying in size. The samples consist of the following:

Style #1503—Bistro 3 cup non-electric coffee maker
Style #1508—Bistro 8 cup non-electric coffee maker
Style #1512—Bistro 12 cup non-electric coffee maker
Style #1568—Loggia 8 cup non-electric coffee maker

The body of each sample consists of a glass carafe. The other parts of each sample include nuts, screws, a filter mesh and a rod band. These parts are composed of stainless steel. In addition, each coffee maker has a plastic handle and cover. The importer contends that stainless steel represents the chief value of the first three samples and that plastic represents the chief value of the fourth sample.

Issue:

What is the tariff classification of the non-electric coffee maker?

Law and Analysis:

The General Rules of Interpretation set forth the manner in which merchandise is to be classified under the HTSUSA. GRI provides that classification is determined according to the terms of the headings and any relevant section or chapter notes and, unless otherwise required, according to the remaining GRI's, taken in order. Heading 7013, HTSUSA, provides for household articles of glass. Heading 7323, HTSUSA, provides for table, kitchen or other household articles of steel. Both headings describe the product at issue.

GRI 3 governs the classification of goods which are *prima facie* classifiable within two or more headings. GRI 3(a) provides that when two or more headings are under consideration, the one providing the most specific description of the merchandise is preferred. All headings are regarded as equally specific, however, when each refers to part only of the goods. Each of the headings, 7013 and 7323, refers to only part of the subject merchandise. Therefore, the headings are regarded as equally specific and the classification of the non-electric coffee makers cannot be determined by the application of the doctrine of relative specificity.

GRI 3(b) provides that composite goods made up of different components which cannot be classified by reference to GRI 3(a) shall be classified as if they consisted of the component which gives them their essential character. Explanatory Note VIII to GRI 3(b) provides that:

> The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

Thus, under the Harmonized Schedule, value is only one of many factors to be considered in determining the essential character of a product. This is in sharp contrast to the deference accorded chief value under the former tariff—the Tariff Schedule of the United States (TSUS)—wherein chief value was often the crucial determining factor in the classification of composite goods.

In the instant case, it is Custom's position that the glass represents the essential character of the non-electric coffee maker. The glass represents the largest portion of the non-electric coffee maker's surface area. The glass constitutes the weightier material. The function of each product is to hold coffee and the glass carafe is the part that performs this function. Accordingly, the non-electric coffee maker is classifiable in Heading 7013, HTSUSA, which provides for glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes.

Holding:

The specially tempered non-electric coffee maker is classifiable in subheading 7013.39.10, HTSUSA, which provides for glassware of a kind used for the table (other than drinking glasses) or kitchen purposes other than that of glass-ceramics, other, pressed and toughened (specially tempered). The rate of duty is 12.5 percent *ad valorem*.

The non-electric coffee maker which is not specially tempered, if valued not over $3 each, is classifiable in subheading 7103.39.20, HTSUSA, which provides for glassware of a kind used for the table (other than drinking glasses) or kitchen purposes other than that of glass-ceramics, other, other. The rate of duty is 30 percent *ad valorem*. If valued over $3 but not over $5 each, the rate of 15 percent *ad valorem* under subheading 7013.39.50, HTSUSA. If valued over $5 each, the rate of duty is 7.2 percent *ad valorem* under subheading 7013.39.60, HTSUSA.

We note that you have requested a ruling on a matter that is not prospective, but rather is the subject of a current transaction. Technically, this is in contravention of the Customs Regulations. We caution that the Internal Advice procedures spelled out in section 177.11 of the Regulations (19 CFR 177.11) should be used in the future when disputes arise with regard to current transactions.

ARTHUR SCHIFFLIN,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, February 25, 1994.

CLA–2–85:S:N:N3:113 894612
Category: Classification
Tariff No. 8516.79.0000 and 7013.39.6000

MR. GAET C. TYRANSKI
CPC AMERICA, INC.
1 Tampa City Center, Suite 2650
201 North Franklin Street
Tampa, FL 33602

Re: The tariff classification of an electric kettle and a coffee pot from China and Taiwan.

DEAR MR. TYRANSKI:

In your letter dated February 3, 1994, you requested a tariff classification ruling.

The merchandise is a kit containing an electric kettle and a cafetiere. Each is an article that may be used independently of the other. The kettle is used to boil water. It does not, in and of itself, make coffee. The cafetiere is an item referred to as a French press. It is a Pyrex pot containing a strainer at the bottom of a plunger. Boiling water and coffee is placed in the pot, and, after an appropriate brewing time, the plunger is pressed to force the grounds to the bottom.

The applicable subheading for the kettle will be 8516.79.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for other electrothermic appliances of a kind used for domestic purposes, other electrothermic appliances, other. The rate of duty will be 5.3 percent *ad valorem*.

The applicable subheading for the cafetiere will be 7013.39.6000, Harmonized Tariff Schedule of the United States (HTS), which provides for glassware of a kind used for table or kitchen purposes * * * other: other: other: valued over $5 each. The rate of duty will be 7.2 percent *ad valorem*.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR:TC:MM 960669 JAS
Category: Classification
Tariff No. 8210.00.00

MR. E. WILLERTH
MIDWEST CUSTOM SERVICES, INC.
P.O. Box 905
631 North Central Avenue
Wood Dale, IL 60191-0905

Re: *HQ* 087313 Revoked; non-electric coffee maker; glass carafe, steel filter mesh and plunger, plastic top and handle, nuts and screws; household appliance for brewing coffee; glassware of a kind used for table, kitchen or similar purposes; hand-operated mechanical appliance, Chapter 82, Note 1(a); Specificity, GRI 3(a).

DEAR MR. WILLERTH:

In *HQ* 087313, issued to you on September 4, 1990, on behalf of **Bodum, Inc.**, certain non-electric coffee makers were held to be classifiable as other household articles of glass, under subheadings 7013.39.10 and 7013.39.20, Harmonized Tariff Schedule of the United States (HTSUS), respectively. We have reconsidered this classification and believe that it is incorrect.

Facts:

The non-electric coffee makers in *HQ* 087313 were the Bistro 3 Cup, Style #1503, the Bistro 8 Cup, Style #1508, the Bistro 12 Cup, Style #1512, and the Loggia 8 Cup, Style #1568. Each model consists of a heat-resistant glass carafe, a steel wire mesh filter attached to a rod-like plunger, plastic handle and cover, a steel reinforcing band extending around the circumference of the carafe, and nuts and screws. In operation, boiling water and coffee are added to the carafe. When the coffee has brewed, the plunger is slowly pressed downward, pushing the grounds to the bottom of the carafe.

The provisions under consideration are as follows:

7013	Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018):
7013.39	Other:
7013.39.10	Pressed and toughened (specially tempered) * * * 12.5 percent *ad valorem*
	Other:

7013.39.20	Valued not over $3 each * * * 27.8 percent *ad valorem*
* * * * * * *	
8210.00.00	Hand-operated mechanical appliances, weighing 10 kg or less, used in the preparation, conditioning or serving of food or drink, and base metal parts thereof * * * 4.3 percent *ad valorem*

Issue:

Whether the Bistro and Loggia style non-electric coffee makers are goods of heading 8210.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The **Harmonized Commodity Description and Coding System Explanatory Notes (ENs)** constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the **ENs** provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the **ENs** should always be consulted. *See* T.D. 89–80. 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

For the reasons stated in *HQ* 087313, the non-electric coffee makers in issue are provided for in heading 7013. However, in rendering this decision, the provision in heading 8210 was not considered. In this regard, Chapter 82, Note 1(a), HTSUS, states, in relevant part, that the chapter covers articles with a working surface or other working part of base metal. The wire mesh filter and plunger, in our opinion, fall within this description. Moreover, relevant **ENs** at p. 1206 state that for the purposes of heading 8210 a simple lever or plunger action is not in itself regarded as a mechanical feature unless the appliance is fitted with base plates, etc., for standing on a table, on the floor, etc. The articles in issue here are fitted around their circumference with a metal band that extends vertically to the floor to form feet. In our opinion, the non-electric coffee makers are described by heading 8210.

GRI 3(a), HTSUS, states that where goods are, *prima facie*, classifiable in two or more headings, the heading which provides the most specific description shall be preferred to headings providing a more general description. In this case, the non-electric coffee makers are *prima facie* classifiable both in heading 7013 and in heading 8210. Heading 7013 provides a less complete description for the good because it does not take account of the base metal mesh filter and plunger. Heading 8210, on the other hand, describes the entire article and more clearly identifies it as an appliance with mechanical capability that operates by hand. In our opinion, heading 8210 provides the most specific description for the non-electric coffee makers in issue.

Holding:

Under the authority of GRI 3(a), HTSUS, non-electric coffee makers identified as the Bistro 3 Cup, Style #1503, the Bistro 8 Cup, Style #1508, the Bistro 12 Cup, Style #1512, and the Loggia 8 Cup, Style #1568 are provided for in heading 8210. They are classifiable in subheading 8210.00.00, HTSUS.

HQ 087313, dated September 4, 1990, is revoked.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:TC:HM 960670 JAS
Category: Classification
Tariff No. 8210.00.00

MR. GAET C. TYRANSKI
CPC CORPORATION
1 Tampa City Center, Suite 2650
201 North Franklin Street
Tampa, FL 33602

Re: *NY* 894612 Modified; non-electric coffee maker; electric kettle, cafetiere, glass carafe with steel filter mesh and plunger, plastic top and handle, nuts and screws; household appliance for brewing coffee; glassware of a kind used for table, kitchen or similar purposes, Heading 7013; hand-operated mechanical appliance, Chapter 82, Note 1(a).

DEAR MR. TYRANSKI:

NY 894612, which the Area Director of Customs, New York Seaport, issued to you on February 25, 1994, held, in part, that a non-electric coffee maker or cafetiere used to brew coffee was classifiable as glassware of a kind used for table or kitchen purposes. We have reviewed this classification and believe that it is incorrect.

Facts:

NY 894612 addressed the tariff status of a kettle and the cafetiere, also known as a French press coffee maker. The kettle, of polypropylene, is available in both cordless and corded designs. The cafetiere is the model T806 and consists of a heat resistant glass pyrex carafe, a handle and lid of polypropylene, base metal nuts and screws, and a steel mesh filter attached to a plunger. A base metal band around the circumference of the carafe extends vertically to the floor to form feet. In operation, the kettle is used to boil the water which is then added to the carafe together with the coffee. When the coffee has brewed, the plunger is slowly pressed downward, pushing the grounds to the bottom of the carafe. *NY* 894612 classified the kettle in subheading 8516.79.00, HTSUS, as an electrothermic appliance of a kind used for domestic purposes, and the cafetiere in subheading 7013.39.60, HTSUS, as glassware of a kind used for table and kitchen purposes.

The provisions under consideration are as follows:

7013	Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018):
7013.39	Other:
7013.39.60	Other, valued over $5 each * * * 7.2 percent *ad valorem*
* * * * * * * * *	
8210.00.00	Hand-operated mechanical appliances, weighing 10 kg or less, used in the preparation, conditioning or serving of food or drink, and base metal parts thereof * * * 4.3 percent *ad valorem*

Issue:

Whether the cafetiere is a good of heading 8210.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The **Harmonized Commodity Description and Coding System Explanatory Notes (ENs)** constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the **ENs** provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the **ENs** should always be consulted. *See* T.D. 89–80. 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

For the reasons stated in *HQ* 087313, the non-electric coffee maker model T806 is provided for in heading 7013. However, in rendering this decision, the provision in heading 8210 was not considered. In this regard, Chapter 82, Note 1(a), HTSUS, states, in relevant part, that the chapter covers articles with a working surface or other working part of base metal. In our opinion, the wire mesh filter and plunger fall within this description. Moreover, relevant **ENs** at p. 1206 state that for the purposes of heading 8210 a simple lever or plunger action is not in itself regarded as a mechanical feature unless the appliance is fitted with base plates, etc., for standing on a table, on the floor, etc. The base metal band that extends vertically to the floor to form feet is within this description. For these reasons, the non-electric coffee maker model T806 is also described by heading 8210.

GRI 3(a), HTSUS, states that where goods are, *prima facie*, classifiable in two or more headings, the heading which provides the most specific description shall be preferred to headings providing a more general description. In this case, the non-electric coffee makers are *prima facie* classifiable both in heading 7013 and in heading 8210. By its terms, heading 7013 provides a less complete description for the good because it does not take into account the base metal mesh filter and plunger. Heading 8210, on the other hand, describes the entire article and more clearly identifies it as an appliance with mechanical capability that operates by hand. In our opinion, heading 8210 provides the most specific description for the non-electric coffee maker model T806.

Holding:

Under the authority of GRI 3(a), HTSUS, the non-electric coffee maker or cafetiere, model T806, is provided for in heading 8210. It is classifiable in subheading 8210.00.00, HTSUS.

NY 894612, dated February 25, 1994, is modified with respect to this merchandise.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

PROPOSED REVOCATION OF TARIFF CLASSIFICATION DECISION RELATING TO SHUNT REACTORS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification decision.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a tariff classification decision under the Harmonized Tariff Schedule of the United States (HTSUS) relating to shunt reactors. These articles are used with transformers on long distance transmission lines that carry high voltage electrical power. Customs invites comments on the correctness of the proposed revocation.

DATE: Comments must be received on or before September 5, 1997.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Tariff Classification Appeals Division, 1301 Constitution Avenue, N.W. (Franklin Court), Washington, D.C. 20229. Submitted comments may be inspected at the Tariff Classification Appeals Divi-

sion, Office of Regulations and Rulings, located at Franklin Court, 1099 14th. Street, N.W., Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Tariff Classification Appeals Division (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a tariff classification decision relating to shunt reactors. Customs invites comments on the correctness of the proposed revocation.

Protest 0712–94–100698, timely filed with Customs in Champlain, New York, on June 23, 1994, contested the liquidation of certain entries of shunt reactors under subheading 8504.50.00, HTSUS, as other inductors. Shunt reactors are used in conjunction with transformers on long distance power lines to carry high voltage electrical power. Their purpose is to draw inductive current to compensate for the capacitive current from the transmission line. This permits the electric current to travel, relatively unimpeded, over long distances. In *HQ* 957025, dated December 30, 1994, Customs sustained protestant's claim under subheading 8504.23.00, as liquid dielectric transformers having a power handling capacity exceeding 10,000 kVA, but denied a claim under subheading 9905.85.15, HTSUS, for lack of evidence to verify voltage rating. *HQ* 957025 is set forth as "Attachment A" to this document.

It is now Customs position that these shunt reactors are in fact inductors, classifiable in subheading 8504.50.00, HTSUS. *HQ* 960691 revoking *HQ* 957025 is set forth as "Attachment B" to this document. Before taking this action, we will give consideration to any written comments timely received.

HQ 957025 reflects a final determination with respect to a particular protest. As such, Customs recognizes that it cannot be modified or revoked with respect to the disposition of the entries in the protest. However, Customs can modify or revoke the legal principles set forth in a protest review decision to reflect the proper classification of the merchandise.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: July 23, 1997.

MARVIN AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, December 30, 1994.

CLA–2 CO:R:C:M 957025 KCC
Category: Classification
Tariff No. 8504.23.00

ASSISTANT DISTRICT DIRECTOR
U.S. CUSTOMS SERVICE
COMMERCIAL OPERATIONS DIVISION
35 W. Service Road
Champlain, NY 12919

Re: Protest 0712–94–100698; shunt reactor; EN 84.05; transformer; inductor; TCR 431.24 A; CFTA; 9905.85.15.

DEAR ASSISTANT DISTRICT DIRECTOR:

This is in regards to Protest 0712–94–100698, concerning the tariff classification power shunt reactors under the Harmonized Tariff Schedule of the United States (HTSUS). Literature describing tile shunt reactor was submitted for our examination.

Facts:

The article under consideration is the power shunt reactor. The protestant states that the voltage classification of the shunt reactor is 362 kV(voltage).75 MVA(reactive power). The shunt reactor is used in conjunction with transformers on long distance transmission lines used to carry high voltage electrical power from the generating station to the load (city, factory, etc.). The shunt reactor creates an effect which absorbs or offsets the capacitive effect along a transmission line which enables long distance transmission at high kilovoltage levels. The shunt reactor consists of a core, winding, electrical connections, tank, oil (i.e., liquid dielectric), bushings, cooling component, and an oil conservator.

The entries of the shunt reactor were liquidated on March 25, 1994, under subheading 8504.50.00, HTSUS, as other inductors. In a protest timely filed on June 23, 1994, the protestant contends that the shunt reactor is classified under subheading 8504.23.00, HTSUS, liquid dielectric transformers, having a power handling capacity exceeding 10,000 kVA. The protestant contends that the shunt reactor is, additionally, classified under subheading 9905.85.15, HTSUS, as transformers exceeding 10,000 kVA having an individual voltage classification of 765 kV or greater.

The subheadings at issue are as follows:

8504	Electrical transformers, static converters (for example, rectifiers) and inductors; parts thereof * * *
8504.23.00	Liquid dielectric transformers * * * Having a power handling capacity exceeding 10,000 kVA * * *.
8504.50.00	Other inductors.
* * * * * * *	
9905.85.15	Goods originating in the territory of Canada under general note 3(c)(vii) of the tariff schedule * * *. Auto-transformers having an individual base MVA exceeding 100 MVA but not exceeding 300 MVA, regardless of voltage classification, and transformers, other than auto-transformers, having an individual base MVA exceeding 50 MVA but not exceeding 275 MVA, regardless of voltage classification, and transformers exceeding 10,000 kVA having an individual voltage classification of 765 kV or greater (provided for in subheading 8504.23.00).

Issue:

1. Is the shunt reactor classified under subheading 8504.23.00, HTSUS, as liquid dielectric transformers, having a power handling capacity exceeding 10,000 kVA, or under subheading 8504.50.00, HTSUS, as other inductors?

2. If the shunt reactor is classified under subheading 8504.23.00, HTSUS, is it classifiable under subheading 9905.85.15, HTSUS, as transformers exceeding 10,000 kVA having an individual voltage classification of 765 kV or greater.

Law and Analysis:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1, HTSUS, states, in part, that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *."

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System ENs may be utilized. The ENs, although not dispositive, provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of the HTSUS. *See*, T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989). EN 85.04 (pgs. 1337–1340) states, in pertinent part, that:

(I) ELECTRICAL TRANSFORMERS

Electrical transformers are apparatus which, without having any moving parts, transform, by means of induction and using a preset or adjustable system, an alternating current into another alternating current of different voltage, impedance, etc. These usually consists of two or more coils of insulated wire wound on laminated iron cores, although in some cases (e.g., radio-frequency transformers) there may be no magnetic core, or the core may be of agglomerated iron dust, ferrite, etc. An AC in one coil (the primary circuit) induces an AC usually at different values of current and voltage in the others (the secondary circuit) * * *.

The heading covers all transformers. They vary from small types used in wireless sets, instruments, toys, etc., to large types enclosed in oil tanks or equipped with radiators, fans, etc., for cooling purposes. The large types are used in electricity stations, stations for interconnecting mains, distributing stations or sub-stations. The frequency may vary from mains frequencies up to very high radio frequencies.

The power-handing capacity of a transformer is the kilovolt-ampere (kVA) output based on continual use at the rated secondary voltage (or amperage, when applicable) and at the rated frequency without exceeding the rated temperature limitations * * *.

(III) INDUCTORS

These consist essentially of a single coil of wire which, inserted in an AC circuit, limits or prevents by its self-induction the flow of the AC. They vary from small chokes used in wireless circuits, instruments, etc., to large coils often mounted in concrete, used in power circuits (e.g., for limiting the flow of current in the event of a short circuit).

Inductors or inductances obtained in the form of individual components by a printing process remain classifiable in this heading.

We note that in TCR 431.24 A (April 18, 1966), Customs classified a shunt reactor, which limited the flow of current in the electrical circuits in the event of a short, in item 682.60, Tariff Schedules of the Untied States (TSUS) (the precursor provision to subheading 8504.50.00, HTSUS), as inductors. However, the shunt reactors under consideration do not appear to be described as transformers or inductors in EN 85.04. Moreover, the IEEE Standard Dictionary of Electrical or Electronic terms, Fourth Edition (1988), defines shunt reactor as:

Shunt reactor (power and distribution transformer). A reactor intended for connection in shunt to an electric system for the purpose of drawing inductive current.

Based on the submitted information and the IEEE definition, we are of the opinion that the shunt reactor is considered to be a transformer by the electric power industry. The protestant's information states that the shunt reactor in this case has a liquid dielectric with a power handling capacity exceeding 10,000 kVA. Therefore, the shunt reactor is classified under subheading 8504.23.00, HTSUS, as liquid dielectric transformers, having a power handling capacity exceeding 10,000 kVA.

Additionally, the protestant states that the shunt reactor is classifiable under subheading 9905.85.15, HTSUS. To be classified under subheading 9905.85.15, HTSUS, the shunt reactor must first be considered an "originating good" for purposes of the United States-Canada Free Trade Agreement (CFTA) pursuant to General Note 3(c)(vii), HTSUS. Although no information was provided regarding CFTA eligibility, we assume a determination was made that the shunt reactor is eligible for CFTA preferential treatment pursuant to General Note 3(c)(vii), HTSUS. This assumption is based on the liquidation duty rate of 1.5 % *ad valorem* under subheading 8504.50.00, HTSUS, the special duty rate for CFTA goods.

Assuming that the shunt reactor is "[g]oods originating in the territory of Canada under general note 3(c)(vii) * * *", we may proceed to whether it is classifiable under subheading 9905.85.15, HTSUS. The protestant states that the voltage classification of the shunt reactor is 362 kV.75 MVA. However, the protestant has not provided any additional information in support of this classification. Based on the information contained in the protest, it does not appear that the shunt reactors are described in subheading 9905.85.15, HTSUS.

Holding:

The shunt reactor is classified under subheading 8504.23.00, HTSUS, as liquid dielectric transformers, having a power handling capacity exceeding 10,000 kVA. The shunt reactors are not described in and, therefore, are not classifiable under subheading 9903.85.15, HTSUS.

The protest should be *GRANTED IN PART* and *DENIED IN PART*, as described above. In accordance with section 3A(11)(b) of Customs Directive 099 3550–065, dated August 4, 1993, Subject: Revised Protest Directive, this decision should be mailed by your office to the protestant no later than 60 days from the date of this letter. Any reliquidation of the entry in accordance with this decision must be accomplished prior to the mailing of the decision. Sixty days from the date of this decision, the Office of Regulations and Rulings will take steps to make the decision available to Customs personnel via the Customs Rulings Module in ACS and to the public via the Diskette Subscription Service, Freedom of formation Act and other public access channels.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:TC:MM 960691 JAS
Category: Classification
Tariff No. 8504.50.00

MS. MARY HASHIM
ASEA BROWN BOVERI, (A.B.B. INC.)
1600 Montee Ste Julie
Varennes, PQ J3X 1S4

Re: *HQ* 957025 Revoked; power shunt reactor, electrical apparatus used with transformers on long distance transmission lines; liquid dielectric transformer, Subheading 8504.23.00, inductor; apparatus for offsetting the capacitive effect of electrical current in power transmission lines; composite machine, principal function, Section XVI, Note 3.

DEAR MS. HASHIM:

On June 23, 1994, Asea Brown Boveri, (A.B.B. Inc.) filed administrative protest 0712–94–100698 with Customs officials in Champlain, New York, contesting the classification under the Harmonized Tariff Schedule of the United States (HTSUS) of certain power shunt reactors.

HQ 957025, issued to the Assistant District Director of Customs, Champlain, New York, on December 30, 1994, granted this protest under subheading 8504.23.00, HTSUS, a provision for liquid dielectric transformers having a power handling capacity exceeding 10,000 kVA, but denied the protest with respect to a claim for duty-free status under subheading 9905.85.15, HTSUS, which prescribes a free rate for originating goods under the North American Free Trade Agreement (NAFTA). We have reconsidered *HQ* 957025, and now believe that it is incorrect.

Facts:

The merchandise in protest 0712–94–100698, a power shunt reactor or shunt reactor, essentially consists of a reactor, also called an inductor, within which are four bushing cur-

rent transformers which step down or reduce the current. Other auxiliary devices include a hot oil thermometer, gauges, valves and relays. The shunt reactor was described in *HQ* 957025 as being used *in conjunction with* transformers on long distance transmission lines that carry high voltage electrical power. They are installed "in shunt" or parallel to high voltage electrical transmission lines. The function of shunt reactors is to create an effect which absorbs or offsets the capacitive effect along the power transmission line. This eliminates unacceptable deviations from the required voltage of the network. This is the only way that large blocks of power at high KV can be transmitted, relatively unimpeded, over long distances.

The provisions under consideration are as follows:

8504	Electrical transformers, static converters (for example, rectifiers) and inductors; power supplies for automatic data processing machines or units thereof of heading 8471; parts thereof:
	Liquid dielectric transformers:
8504.23.00	Having a power handling capacity exceeding 10,000 kVA * * * 2.1 percent *ad valorem*/Free under subheading 9905.85.15 as an originating good under NAFTA
* * *	* * * * * * *
8504.50.00	Other inductors * * * 3 percent *ad valorem*/0.3 percent as an originating good under NAFTA

Issue:

Whether power shunt reactors are inductors of heading 8504.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

Section XVI, Note 3, HTSUS, which governs the classification of goods in heading 8504, among others, states that unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines adapted for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.

The decision in *HQ* 957025 classifying power shunt reactors in subheading 8504.23.00, HTSUS, as liquid dielectric transformers, was based in part on Customs belief that power shunt reactors are considered by the electric power industry to be transformers. This is not the case. The power shunt reactors in issue, each consisting of an inductor and multiple bushing current transformers, qualify under Section XVI, Note 3, HTSUS, as composite machines that are to be classified as if consisting of that component or as being that machine which performs the principal function. The available evidence indicates that the electric power industry recognizes shunt reactors with bushing current transformers to be inductors, and that by function and design, the transformers are auxiliary or accessory devices to the reactors' primary function of inductance. This warrants the conclusion that power shunt reactors are classifiable as inductors.

Holding:

Under the authority of GRI 1, power shunt reactors are provided for in heading 8504. They are classifiable in subheading 8504.50.00, HTSUS.

HQ 957025 reflects a final determination with respect to a particular protest. As such, Customs recognizes that it cannot be modified or revoked with respect to the disposition of the entries in that protest. However, for the reasons stated above, the legal principles set forth in *HQ* 957025 are hereby revoked and no longer represent the position of the Customs Service with respect to the classification of power shunt reactors.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

PROPOSED MODIFICATION OF RULING LETTER RELATING TO SKIDS AND TOTES USED AS INSTRUMENTS OF INTERNATIONAL TRAFFIC

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of ruling letter relating to articles used as instruments of international traffic.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify one ruling letter relating to articles designated as instruments of international traffic. The components are skids, and plastic and metal totes used to ship industrial component parts, consisting of screws, nuts, washers, spacers and miscellaneous fabricated components made in the United States and shipped to subsidiary plants in Mexico and Canada. The plastic totes described in the ruling letter are marked "Made in Canada" but according to the ruling letter are actually manufactured in the United States. In addition to Customs determination that the articles are instruments of international traffic, the letter notes "parenthetically" that certain of the markings are incorrect pursuant to 15 U.S.C. § 1125, which proscribes false designation and misdescription of goods. The proposed modification would remove the reference to 15 U.S.C. § 1125 as inapplicable to the holding of the ruling letter and incorrect in Customs view. Customs invites comments on the correctness of the proposed modification.

DATE: Comments must be received on or before September 5, 1997.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Intellectual Property Rights Branch, 1301 Constitution Avenue, NW (Franklin Court), Washington, DC 20229. Submitted comments may be inspected at the Intellectual Property Rights Branch, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, NW, Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Karl Wm. Means, Intellectual Property Rights Branch, (202) 482–6960.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify one ruling letter relating to articles

designated as instruments of international traffic. Customs invites comments on the correctness of the proposed modification.

HQ 113157, dated August 4, 1994, held that certain articles, namely skids and plastic and metal totes used to ship industrial control components, are instruments of international traffic within the meaning of 19 U.S.C. §1322(a) and §10.41a, Customs Regulations (19 C.F.R. §10.41a). Customs does not consider the holding of the ruling letter to be incorrect and the modification herein proposed leaves intact that holding.

However, in addition to the holding, the letter parenthetically addressed certain markings found on the totes. Specifically, the letter stated that

> [T]he plastic totes that are currently manufactured in the United States yet reference Canada as their country of origin are incorrectly marked pursuant to 15 U.S.C. §1125. As products of the United States these articles need no country of origin designation. Consequently, the "Made in Canada" legend appearing on them should be removed.

That conclusion was not made part of the holding of the letter.

Subsequent to the issuance of HQ 113157, counsel for the instruments' user requested that Customs "clarify" the portion of the letter dealing with the marking under 15 U.S.C. § 1125, and specifically the requirement that the "Made in Canada" marking be removed.

After reviewing the facts, Customs has determined that the reference to 15 U.S.C. § 1125 should be removed. 15 U.S.C. § 1125 is intended to prevent confusion among consumers as to the source or sponsorship of the article(s). In this case, there are no consumers of the totes. The shipper of the component parts manufactures the totes, and they are used exclusively by the manufacturer in the conduct of its own business. The manufacturer is not, in Customs' opinion, likely to be confused as to the source of its own totes. Therefore, it is now Customs position that 15 U.S.C. § 1125 is not applicable in this case, as there is no likelihood of confusion. HQ 113157 is set forth as Attachment "A" to this document.

Customs intends to modify HQ 113157 by removing the paragraph referring to "Made in Canada" and 15 U.S.C. § 1125. The remainder of the letter will remain unaffected. Before taking this action, we will give consideration to any written comments timely received. Proposed HQ 460528 modifying HQ 113157 is set forth as Attachment "B" to this document.

Dated: July 11, 1997.

JERRY LADERBERG,
Acting Director,
International Trade Compliance Division.

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, August 4, 1994.
BOR–7–07–CO:R:IT:C 113157 GEV
Category: Carriers

BRUCE N. SHULMAN, ESQ.
STEIN SHOSTAK SHOSTAK & O'HARA
1620 L Street, N.W.
Washington, DC 20036–5605

Re: Instruments of International Traffic; Skids; Totes; 19 U.S.C. § 1322.

DEAR MR. SHULMAN:

This is in response to your letter dated June 6, 1994, requesting that certain skids, and plastic and metal totes which your client uses to ship industrial control components, be designated as instruments of international traffic pursuant to 19 U.S.C. § 1322 and 19 CFR § 10.41a. Our ruling on this matter is set forth below.

Facts:

Allen-Bradley Company ("Allen-Bradley") of Milwaukee, Wisconsin, uses certain skids, and plastic and metal totes to ship industrial control component parts, consisting of screws, nuts, washers, spacers and miscellaneous fabricated components made in its Milwaukee facility, to its subsidiary plants in Mexico and Canada. The subsidiaries use these components to build various subassemblies used in Allen-Bradley's industrial control products.

These completed subassemblies are then re-packaged in these various shipping containers and returned to Milwaukee, where they are incorporated into Allen-Bradley's industrial control products.

The skids, which have welded steel frames with hardwood panels inserted therein, measure 36″ long, 30″ wide, and 7″ high. The metal totes measure approximately 19½″ long and 11½″ wide, and come in three different heights: 4 1/8″; 6″, and; 7 15/16″. The plastic totes measure approximately 20″ long, 11″ wide, and 5½″ high.

Further in regard to the plastic totes, it is stated that although they were originally manufactured in Canada, they are currently being manufactured in the United States. However, the original mold, which references the origin of the totes as being Canadian, is still being used.

Thousands of the aforementioned skids and totes have been produced and are currently in use. Approximately 100 skids per week are shipped between the United States, Canada and Mexico, with each skid containing 50 totes. Copies of drawings and specifications for these articles were enclosed with the ruling request.

Issue:

Whether the skids and totes under consideration which are used to ship industrial control components are instruments of international traffic within the meaning of 19 U.S.C. § 1322(a) and § 10.41a, Customs Regulations (19 CFR § 10.41a).

Law and Analysis:

Title 19, United States Code, § 1322(a) (19 U.S.C. § 1322(a)), provides that "[v]ehicles and other instruments of international traffic, of any class specified by the Secretary of the Treasury, shall be excepted from the application of the customs laws to such extent and subject to such terms and conditions as may be prescribed in regulations or instructions of the Secretary of the Treasury."

The Customs Regulations issued under the authority of § 322(a) are contained in § 10.41a (19 CFR § 10.41a). Section 10.41a(a)(1) specifically designates lift vans, cargo vans, shipping tanks, skids, pallets, caul boards, and cores for textile fabrics as instruments of international traffic.

Section 10.41a(a)(1) also authorizes the Commissioner of Customs to designate other items as instruments of international traffic in decisions to be published in the weekly CUSTOMS BULLETIN. Once designated as instruments of international traffic, these items may be released without entry or the payment of duty, subject to the provisions of § 10.41a.

To qualify as an "instrument of international traffic" within the meaning of 19 U.S.C. § 1322(a) and the regulation promulgated pursuant thereto (19 CFR § 10.41a *et seq.*), an

article must be used as a container or holder. The article must be substantial, suitable for and capable of repeated use, and used in significant numbers in international traffic. (See subheading 9803.00.50, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), and former Headnote 6(b)(ii), Tariff Schedules of the United States (HTSUS), as well as Headquarters Decisions 104766; 108084; 108658; 109665; and 109702).

The concept of reuse contemplated above is for commercial shipping or transportation purposes, and not incidental or fugitive uses. Tariff Classification Study, Sixth Supplemental Report (May 23, 1963) at 99. See *Holly Stores Inc. v. United States*, 697 F.2d 1387 (Federal Circuit, 1982).

In *Holly Stores, supra*, the court determined that "reuse" in the context of former General Headnote 6(b)(ii) "has been *consistently* interpreted to mean practical, commercial reuse, not incidental reuse." (Emphasis added). In that case, articles of clothing were shipped into this country on wire or plastic coat hangers. Evidence showed that the hangers were designed to be, and were of fairly durable construction and that it would be physically possible to reuse them. However, the court found that only about one percent of the hangers were reused in any way at all, and that those uses were of a noncommercial nature. The court held that the uses of these hangers beyond shipping them once from overseas to the United States were purely incidental, and concluded that the hangers were "not designed for, or capable of, reuse". Subsequent Customs rulings on this matter have held that single use is not sufficient; reuse means more than twice (Headquarter rulings 105567 and 108658). Furthermore, it is our position that the burden of proof to establish reuse is on the applicant, even though the applicant may not be the party reusing the instrument.

Upon reviewing Allen-Bradley's request and the accompanying documentation, we have determined that the above requirements for designation as an instrument of international traffic have been met with respect to the skids, and plastic and metal totes in question.

Parenthetically, we note that notwithstanding our above determination, the plastic totes that are currently manufactured in the United States yet reference Canada as their country of origin are incorrectly marked pursuant to 15 U.S.C. § 1125. As products of the United States these articles need no country of origin designation. Consequently, the "Made in Canada" legend appearing on them should be removed.

Holding:

The skids, and plastic and metal totes under consideration which are used to ship industrial control components are instruments of international traffic within the meaning of 19 U.S.C. § 1322(a) and § 10.41a, Customs Regulations (19 CFR § 10.41a).

ARTHUR P. SCHIFFLIN,
Chief,
Carrier Rulings Branch.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

BOR–7–07–CO:R:IT:C 460523
Category: Carriers

BRUCE N. SHULMAN, ESQ.
STEIN SHOSTAK SHOSTAK & O'HARA
1620 L Street, N.W.
Washington, DC 20036–5605

Re: Instruments of International Traffic; Skids; Totes; 19 U.S.C. § 1322.

DEAR MR. SHULMAN:

This is in response to your letter dated May 8, 1995, in which you ask that Customs reconsider and modify Headquarters (HQ) Ruling Letter 113157, regarding instruments of international traffic. In that ruling, Customs indicated that 15 U.S.C. § 1125 was applicable to certain markings on the articles and that said markings should be removed. After

reconsideration, we have determined that the reference to 15 U.S.C. § 1125 was incorrect and that the ruling should so modified. The modified ruling is set forth below. Other than the deleted paragraph referring to 15 U.S.C. § 1125, the FACTS, ANALYSIS and HOLDING are in all other respects identical to HQ 113157.

Facts:

Allen-Bradley Company ("Allen-Bradley") of Milwaukee, Wisconsin, uses certain skids, and plastic and metal totes to ship industrial control component parts, consisting of screws, nuts, washers, spacers and miscellaneous fabricated components made in its Milwaukee facility, to its subsidiary plants in Mexico and Canada. The subsidiaries use these components to build various subassemblies used in Allen-Bradley's industrial control products.

These completed subassemblies are then re-packaged in these various shipping containers and returned to Milwaukee, where they are incorporated into Allen-Bradley's industrial control products.

The skids, which have welded steel frames with hardwood panels inserted therein, measure 36″ long, 30″ wide, and 7″ high. The metal totes measure approximately 19½″ long and 11½″ wide, and come in three different heights: 4 1/8″; 6″, and; 7 15/16″. The plastic totes measure approximately 20″ long, 11″ wide, and 5½″ high.

Further in regard to the plastic totes, it is stated that although they were originally manufactured in Canada, they are currently being manufactured in the United States. However, the original mold, which references the origin of the totes as being Canadian, is still being used.

Thousands of the aforementioned skids and totes have been-produced and are currently-in-use. Approximately 100 skids per week are shipped between the United States, Canada and Mexico, with each skid containing 50 totes. Copies of drawings and specifications for these articles were enclosed with the ruling request.

Issue:

Whether the skids and totes under consideration which are used to ship industrial control components are instruments of international traffic within the meaning of 19 U.S.C. § 1322(a) and § 10.41a, Customs Regulations (19 CFR § 10.41a).

Law and Analysis:

Title 19, United States Code, § 1322(a) (19 U.S.C. § 1322(a)), provides that "[v]ehicles and other instruments of international traffic, of any class specified by the Secretary of the Treasury, shall be excepted from the application of the customs laws to such extent and subject to-such terms and conditions as may be prescribed in regulations or instructions of the Secretary of the Treasury."

The Customs Regulations issued under the authority of § 322(a) are contained in § 10.41a (19 CFR § 10.41a). Section 10.41a(a)(1) specifically designates lift vans, cargo vans, shipping tanks, skids, pallets, caul boards, and cores for textile fabrics as instruments of international traffic.

Section 10.41a(a)(1) also authorizes the Commissioner of Customs to designate other items as instruments of international traffic in decisions to be published in the weekly CUSTOMS BULLETIN. Once designated as instruments of international traffic, these items may be released without entry or the payment of duty, subject to the provisions of § 10.41a.

To qualify as an "instrument of international traffic" within the meaning of 19 U.S.C. § 1322(a) and the regulation promulgated pursuant thereto (19 CFR § 10.41a et seq.), an article must be used as a container or holder. The article must be substantial, suitable for and capable of repeated use, and used in significant numbers in international traffic. (See subheading 9803.00.50, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), and former Headnote 6(b)(ii), Tariff Schedules of the United States (HTSUS), as well as Headquarters Decisions 104766; 108084; 108658; 109665; and 109702).

The concept of reuse contemplated above is for commercial shipping or transportation purposes, and not incidental or fugitive uses. Tariff Classification Study, Sixth Supplemental Report (May 23, 1963) at 99. *See Holly Stores, Inc. v. United States*, 697 F.2d 1387 (Federal Circuit, 1982).

In *Holly Stores, supra,* the court determined that "reuse" in the context of former General Headnote 6(b)(ii) "has been consistently interpreted to mean practical, commercial reuse, not incidental reuse." (Emphasis added). In that case, articles of clothing were shipped into this country on wire or plastic coat hangers. Evidence showed that the hang-

ers were designed to be, and were of fairly durable construction and that it would be physically possible to reuse them. However, the court found that only about one percent of the hangers were reused in any way at all, and that those uses were of a noncommercial nature. The court held that the uses of these hangers beyond shipping them once from overseas to the United States were purely incidental, and concluded that the hangers were "not designed for, or capable of, reuse". Subsequent Customs rulings on this matter have held that single use is not sufficient; reuse means more than twice (Headquarter rulings 105567 and 108658). Furthermore, it is our position that the burden of proof to establish reuse is on the applicant, even though the applicant may not be the party reusing the instrument.

Upon reviewing Allen-Bradley's request and the accompanying documentation, we have determined that the above requirements for designation as an instrument of international traffic have been met with respect to the skids, and plastic and metal totes in question.

Holding:

The skids, and plastic and metal totes under consideration which are used to ship industrial control components are instruments of international traffic within the meaning of 19 U.S.C. § 1322(a) and § 10.41a, Customs Regulations (19 CFR § 10.41a).

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
R. Kenton Musgrave
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Dominick L. DiCarlo

Nicholas Tsoucalas

Clerk

Raymond F. Burghardt

Decisions of the United States Court of International Trade

(Slip Op. 97–94)

AMERICAN SILICON TECHNOLOGIES, ELKEM METALS CO., GLOBE METALLURGICAL, INC. AND SKW METALS & ALLOYS, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND COMPANHIA FERROLIGAS MINAS GERAIS-MINASLIGAS AND ELETROSILEX BELO HORIZONTE, DEFENDANTS-INTERVENORS

Court No. 96–10–02313

(Dated July 9, 1997)

ORDER

MUSGRAVE, *Judge:* Upon consideration of defendant's consent motion for leave to consider ministerial error allegations and correct ministerial errors identified, it is hereby

ORDERED that Defendant's motion is granted; and it is further

ORDERED that the Department of Commerce, International Trade Administration ("ITA"), is directed to consider the following alleged ministerial errors and correct ministerial errors identified in the allegations and contained in *Silicon Metal from Brazil; Final Results of Antidumping Duty Administrative Review*, 61 Fed. Reg. 46763 (Sep. 5, 1996):

(1) Whether Commerce, in calculating profit from CBCC, Eletrosilex, and RIMA, incorrectly subtracted imputed credit expenses from home market prices;

(2) Whether Commerce applied the wrong exchange rate to convert charges related to one of CBCC's and one of Eletrosilex's U.S. sales;

(3) Whether Commerce applied the wrong cost of manufacturing in calculating the dumping margin for one of CBCC's U.S. sales;

(4) Whether Commerce failed to properly include IPI taxes in constructed value for CBCC;

(5) Whether Commerce failed to properly deduct "other expenses" from one of CBCC's U.S. sales;

(6) Whether Commerce, in conducting its cost investigation for Eletrosilex, failed to properly subtract commissions from the net home market prices;

(7) Whether Commerce, in calculating Eletrosilex's total general expenses, incorrectly subtracted an aggregate value rather than a per-unit amount for inland freight;

(8) Whether Commerce failed to properly include duty drawback in calculating constructed value for Eletrosilex;

(9) Whether Commerce, in calculating construct value for Eletrosilex, incorrectly subtracted home market packing expenses;

(10) Whether Commerce applied the wrong date of shipment to calculate U.S. imputed credit expenses for Minasligas;

(11) Whether Commerce converted a U.S. price of Minasligas using the wrong exchange rate;

(12) Whether Commerce converted the warehousing expense for Minasligas using the wrong exchange rate;

(13) Whether Commerce erred in calculating the percentage of overhead allocated to RIMA's silicon metal production by using unadjusted credit materials costs;

(14) Whether Commerce in calculating constructed value for CBCC, erred by applying the same interest ration as that used in CBCC's cost of production;

(15) Whether Commerce erred by calculating and applying a monthly financial expense ration to CBCC's cost of manufacturing, rather than calculating and applying an annual financial expense ration; and

(16) Whether Commerce erred by applying the interest expense ratio to replacement costs, rather than to historical costs, for CBCC, and it is further

ORDERED that ITA shall correct any ministerial errors identified and publish Amended Final Results, incorporating any such corrections, in the *Federal Register* within sixty (60) days following entry of this order; and it is further

ORDERED that other proceedings in this case are stayed pending publication of the Amended Final Results.

(Slip Op. 97–95)

U.S. STEEL GROUP A UNIT OF USX CORP., USS/KOBE STEEL CO., AND KOPPEL STEEL CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND SIDERCA S.A.I.C. AND SIDERCA CORP., DEFENDANT-INTERVENORS

Consol. Court No. 95–09–01144

[Commerce's final antidumping determination sustained in part and remanded in part.]

(Decided July 14, 1997)

Skadden, Arps, Slate, Meagher & Flom (Robert E. Lighthizer, John J. Mangan) for Plaintiffs U.S. Steel Group a Unit of USX Corp., USS/Kobe Steel Co., and Koppel Steel Corp.

Schagrin Associates (Roger B. Schagrin, R. Alan Luberda) for Plaintiff-Intervenor Maverick Tube.

Wiley, Rein & Fielding (Charles Owen Verrill, John R. Shane) for Plaintiff-Intervenor North Star Steel.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director; *Velta A. Melnbrencis,* Assistant Director, Dept. of Justice, Civil Division, Commercial Litigation Branch; *Barbara Campbell-Potter,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, Dept. of Commerce, for Defendant.

White & Case (David P. Houlihan, Gregory J. Spak, Christopher M. Curran, Richard J. Burke) for Defendant-Intervenors Siderca S.A.I.C. and Siderca Corp.

OPINION

POGUE, *Judge:* Plaintiffs, Siderca and Siderca S.A.I.C. ("Siderca") and U.S. Steel ("domestic producers"), filed separate actions challenging aspects of the International Trade Administration's final determination in *Oil Country Tubular Goods from Argentina*, 60 Fed. Reg. 33,539 (Dep't. Commerce 1995)(final det.)[hereinafter Final Det.]. The two actions were consolidated.

The Court has jurisdiction under 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(A).

BACKGROUND

On July 26, 1994, Commerce initiated an antidumping investigation of oil country tubular goods (OCTG) from Argentina pursuant to 19 U.S.C. § 1673a (1988). *Oil Country Tubular Goods From Argentina, Austria, Italy, Japan, Korea, Mexico, and Spain*, 59 Fed. Reg. 37,962 (Dep't. Commerce 1994)(init. antidumping duty investigations).[1] In such an investigation, Commerce compares foreign market value and United States price[2] to determine whether dumping exists, and to calculate the dumping margin.

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[1] OCTG are hollow steel products of circular cross-section, including oil well casing, tubing, and drill pipe, or iron (other than cast iron) or steel (both carbon and alloy), whether seamless or welded, whether or not conforming to American Petroleum Institute ("API") or non-API specifications, whether finished or unfinished (including green tubes and limited service OCTG products). 59 Fed. Reg. at 37,962.

[2] 19 U.S.C. §§ 1677a, 1677b (1988). The terminology has since changed. The antidumping law was amended by the Uruguay Round Agreements Act, Pub. L. No. 103–465, 108 Stat. 4809 (1994) (URAA). The URAA does not apply to investigations initiated prior to January 1995. Under the current statute "normal value" has replaced the term "foreign market value," and "export price and constructed export price" have replaced the term "United States price." *See* 19 U.S.C. §§ 1677a, 1677b (1994).

In the course of the investigation, Commerce issued an antidumping questionnaire to Siderca and verified Siderca's responses. Commerce determined that home market (i.e., Argentine) sales were not "viable" during the period of investigation, January 1 through June 30, 1994, i.e., Commerce decided that Siderca's home market sales were not adequate for the purpose of determining foreign market value ("FMV") of oil country tubular goods ("OCTG"). Therefore, Commerce decided to base FMV upon sales of OCTG to the People's Republic of China ("PRC" or "China").[3]

In its preliminary determination, Commerce found a dumping margin for Siderca of 0.61%. *See Oil Country Tubular Goods From Argentina*, 60 Fed. Reg. 6503 (Dep't. Commerce 1995) (prelim. det. & postponement final det.). Subsequently, Commerce issued an Amended Preliminary Determination in order to correct the Preliminary Determination for a clerical error. *See Oil Country Tubular Goods From Argentina*, 60 Fed. Reg. 13,119 (Dep't. Commerce 1995) (am. prelim. det.). In the Amended Preliminary Determination Commerce found a dumping margin for Siderca of 0.42%, *see id.* at 13,119, a de minimis dumping margin under Commerce's regulations.[4]

After verification, Commerce made a final determination that Siderca's dumping margin was 1.36%. *See* Final Det., 60 Fed. Reg. at 33,550. Because Commerce found a dumping margin for Siderca above the de minimis level, and the International Trade Commission found that a domestic industry was materially injured or threatened with material injury by reason of imports of the subject merchandise, *See Oil Country Tubular Goods from Argentina*, 60 Fed. Reg. 41,055, 41,055 (Dep't. Commerce 1995) (antidumping duty order), Commerce issued an antidumping duty order for OCTG from Argentina. *Id.*

Siderca objects to Commerce's Final Determination contending that Commerce's circumstance of sale ("COS") adjustment for indirect tax rebates was improper. The domestic steel producers object to the Final Determination for the following reasons: 1) In determining Siderca's cost of production, Commerce relied on budgeted rather than actual figures for Siderca's per-unit fixed costs; 2) Commerce allowed Siderca to offset its general expenses with revenues from miscellaneous sales; and 3) Commerce deducted the full amount of Siderca's indirect tax rebate from its cost of production.

STANDARD OF REVIEW

In reviewing a final antidumping determination the Court of International Trade must decide whether Commerce's determination is in accordance with law and whether Commerce's conclusions are supported by substantial evidence on the record. 19 U.S.C. § 1516a(b)(1)(B)(1994).

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[3] FMV is normally based upon the sales price of the merchandise in the home market. Because Commerce determined that the home market was not a viable one for the relevant time period, Commerce based FMV on Siderca's sales to a third country market, i.e., the PRC. *See* 19 U.S.C. § 1677b(a)(1)(B). This decision is not challenged in this action.

[4] Pursuant to regulations applicable to this antidumping investigation, Commerce disregards any weighted-average dumping margin that is less than 0.5% *ad valorem*. *See* 19 C.F.R. § 353.6.

When Commerce's interpretation of the antidumping statute is challenged, this court applies the two-step analysis articulated in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*,[5] as applied and refined by the Federal Circuit. Considerable weight is accorded Commerce's construction of the antidumping laws, whether that construction manifests itself in the application of the statute, *see, e.g., Daewoo Elec. Co. v. Int'l Union of Elec., Technical, Salaried and Mach. Workers*, 6 F.3d 1511, 1516 (Fed. Cir. 1993), *cert. denied* 512 U.S. 1204, 114 S. Ct. 2672 (1994), or in the promulgation of a regulation, *see, e.g., Smith-Corona Group v. United States*, 713 F.2d 1568, 1575 (Fed. Cir. 1983), *cert. denied* 465 U.S. 1022, 104 S. Ct. 1274 (1984).

When examining Commerce's factual determinations to decide whether they are supported by substantial evidence, the court must determine whether the record contains "such relevant evidence as a reasonable mind might accept as adequate to support Commerce's conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S. Ct. 206, 217 (1938); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S. Ct. 456, 459 (1951)(*quoted in Matsushita Elec. Indus. Co., Ltd. v. United States*, 3 Fed. Cir. (T) 44, 750 F.2d 927, 933 (1984)). Substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620, 86 S. Ct. 1018, 1026 (1966)(citations omitted).

The Circumstance of Sale Adjustment

A. Facts Pertinent To Siderca's COS Adjustment Issue

The Government of Argentina has adopted a cumulative, indirect tax system pursuant to which certain indirect taxes are imposed at various stages of production, become embedded in the price of the product at those stages, and are then passed on to the next stage through the price of the intermediate product. This system is cumulative because the indirect taxes imposed at a given stage of production become embedded in the price of the product at the next stage of production, with indirect taxes again imposed on the total value of the product at that stage. The Government of Argentina also has a tax rebate program (the reintegro system, formerly the reembolso system), which provides for government rebate, upon export, of indirect taxes imposed and embedded in the price of the finished product.

In response to Commerce's antidumping questionnaire, Siderca reported that the indirect tax rebate amount received for sales of OCTG to

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[5] When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842–43, 104 S. Ct. 2778, 2781–82 (1984) (footnotes omitted). See generally KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE, § 3.2 (1994).

the United States differed from the rebate amount for sales to the PRC. Specifically, for sales to the PRC, Siderca received the full amount of the allowable rebate for OCTG: 15%. For sales to the United States, however, Siderca received only a partial rebate of the total allowable amount: 8.3%. (U.S. Dep't. of Commerce Verification of Production and Constructed Value Data, April 26, 1995 at 2 (Mem. U.S. Steel Group in Opp'n. to the Mot. for J. Agency R. Siderca, Tab 5)).

In the Final Determination, Commerce explained:

> Included in Siderca's manufacturing costs of OCTG are taxes paid to the Argentine government. Siderca received a rebate of these taxes upon exportation of the merchandise. However, the amount of the rebate claimed by Siderca for the two export markets was not identical. * * * Because only a partial rebate is taken for U.S. sales, a portion of the tax imposed by the Argentine government remains in the U.S. price (the difference between the total rebate and the partial rebate taken). Because these rebates are directly related to the sales of the merchandise in the two markets, it is necessary to make a circumstance-of-sale adjustment to FMV to account for the different amount of taxes included in the Chinese and U.S. prices. * * *
>
> In calculating dumping margins, the Department equalizes the effective rates in each market. Normally (* * * the home market sale is taxed, but the export sale to the United States is not taxed) * * *. Here, * * * the pipe exported to the United States was taxed in excess of the tax on the pipe exported to China * * *. Because the statute provides no mechanism for removing tax from the U.S. price, however, we achieved the necessary equivalence in tax rates by adding the difference between the effective rebate percentages claimed by Siderca * * * to the price of the pipe exported to China as a circumstance-of-sale adjustment, * * *. This prevented Siderca's acceptance of a complete tax rebate on the sales to China, but only a partial export tax rebate on the sales to the United States from masking any tax-net dumping margin.

60 Fed. Reg. at 33,546–47 (Comment 6).

Commerce raised FMV by 6.1%,[6] which is the amount of the difference in rebates claimed by Siderca between sales for export to the PRC and to the United States.

B. Discussion

1. Siderca argues that Commerce's circumstances of sale adjustment was "inconsistent with the statutory provisions governing the per-

---

[6] The reason for raising FMV by 6.1%, and not 6.7% was that Siderca reported average effective rebates and, as Commerce explained, it calculated the difference between these average effective rebates:

> We calculated the difference between the effective rebate received on sales to China and the effective rebate received on sales to the U.S. The respective nominal rebates, 15% and 8.3%, are applied to the FOB price adjusted for importations of materials under temporary importation bond. Siderca calculated the average effective rebate for both markets, see verification exhibit 19. Siderca calculated effective rebates by first dividing the shipment specific rebate by the FOB price, then calculating a weighted average for the period. The effective rebate to China was 13.68%. The effective rebate to the U.S. was 7.58%. The difference between the effective rebate received on sales to China and the effective rebate received on sales to the U.S. was 13.68%—7.58% = 6.1%. This amount represents an adjustment to third country price.

Mem. from Accountant to Program Manager of Office of Accounting, dated June 16, 1995, at 2, para. 4, Prop. Doc. 89, Def.'s Ex. 19.

mitted adjustments to USP and FMV, * * *." (Mem. P. & A. Supp. of Mot. Siderca S.A.I.C. and Siderca Corp. for J. on the Agency R. [hereinafter Siderca's Mot. J. Agency R.] at 18). As Siderca points out, indirect taxes are mentioned only once within these statutory provisions, at 19 U.S.C. § 1677a(d)(1)(C), which says that USP shall be increased by:

> the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated * * * by reason of the exportation * * * to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation.

"Implicit in this provision," Siderca argues, " is that the price comparison at issue involve (sic) a comparison of the USP to an FMV that is based on the exporter's sales in its home market." (Siderca's Mot. for J. Agency R. at 19). The government agrees that the provision applies only when FMV is based on home-market sales. *See* letter from U.S. Department of Justice to U.S. Court of International Trade, October 8, 1996 at 8 ("The statutory scheme provides specifically for an adjustment for rebated taxes only when the comparison is between sales to the U.S. and sales for home market consumption * * *.") As Commerce noted in the Final Determination, in the usual case, home-market sales are taxed and exports are not taxed. In such a case, when comparing the prices of merchandise exported to the United States and merchandise exported to a third country, no adjustment for taxes is necessary. The statute does not contain a provision that specifically addresses the situation now before the court, in which sales in the United States are taxed in excess of sales in the country upon which FMV is based.[7]

In the absence of such a provision, Commerce made an adjustment pursuant to 19 U.S.C. § 1677b(a)(4)(B) (1988), which states:

> In determining foreign market value, if it is established to the satisfaction of the administering authority that the amount of any difference between the United States price and the foreign market value (or that the fact that the United States price is the same as the foreign market value) is wholly or partly due to * * *
>
> (B) other differences in circumstances of sale * * * then due allowance shall be made therefor.

Siderca argues that under the statute the tax rebate does not qualify as a circumstance of sale. Siderca also argues that the adjustment does not meet the requirements of the regulation enacted by Commerce to carry out the circumstance of sale provision. The regulation states:

> In calculating foreign market value, the Secretary will make a reasonable allowance for a *bona fide* difference in the circumstances of the sales compared if the Secretary is satisfied that the amount of any price differential is wholly or partly due to such difference. In

[7] Siderca accepts a full tax rebate on merchandise sold to the PRC and only a partial tax rebate for merchandise sold to the United States. The net effect is that Siderca pays a higher tax on goods sold to the United States.

> general, the Secretary will limit allowances to those circumstances which bear a direct relationship to the sales compared.

19 CFR § 353.56. Siderca contends that the regulation's "direct relationship" language has been interpreted to mean that the party requesting the COS adjustment must show a causal link between the alleged circumstance of sale and the price of the subject merchandise. Siderca concludes that Commerce has failed to adequately demonstrate that such a link exists and that the COS adjustment was not lawful. The Court does not agree.

In *Smith-Corona Group v. United States*, 1 Fed. Cir. (T) 130, 713 F.2d 1568 (1983), *cert. denied* 465 U.S. 1022, 1045 S. Ct. 1274 (1984), the court held that Section 1677b(a)(4) "does not expressly limit the exercise of the Secretary's authority to determine adjustments, nor does it include the precise standards or guidelines to govern the exercise of that authority. * * * Congress has deferred to the Secretary's expertise in this matter." *Id.* at 137, 713 F.2d at 1575. Thus Commerce has broad discretion to decide what constitutes a bona fide circumstance of sale. *See id.* at 132, 713 F.2d at 1571.

In *Sawhill Tubular Div. Cyclops Corp. v. United States*, 11 CIT 491, 666 F. Supp. 1550 (1987), the court found that Commerce had properly made a circumstance of sale adjustment in the amount of an export rebate paid to a foreign carbon steel pipe and tube manufacturer. The *Sawhill* court rejected plaintiff's argument that a circumstance of sale adjustment is appropriate only in the case of a difference in selling expenses. "[T]his Court declines to adopt * * * a narrow construction of the circumstances of sale provision. Section 1677b(a)(4)(B) was designed to facilitate a fair and efficient comparison between foreign market value and price in the United States market." *Id.* at 497, 666 F. Supp. at 1555. Thus, *Sawhill* established that under certain circumstances an export rebate can constitute a circumstance of sale. As in *Sawhill*, in this case Commerce has established that the rebate was "'directly related to, and in fact contingent upon, the export sale of the merchandise under investigation.'" *Id.* at 498, 666 F. Supp. at 1555–56 (quoting *Certain Welded Carbon Steel Standard Pipe and Tube from India*, 51 Fed. Reg. 9089, 9091 (Dep't Commerce 1996)(final det.). *See also Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 13 F.3d 398, 400 ("[t]here is no specific statutory authorization for Commerce to deduct home-market transportation expenses from its calculations of FMV. In the past, Commerce determined whether to deduct home-market transportation costs by looking to the 'circumstances of sale' provision of 19 U.S.C. § 1677b(a)(4) (1988)."), *cert. denied sub nom Cemex, S.A. v. United States*, 513 U.S. 813, 115 S. Ct. 67 (1994).

The rebate also meets the conditions set out in *Budd Co., Wheel & Brake Div. v. United States*, 14 CIT 595, 746 F. Supp. 1093 (1990). The *Budd* court stated, "circumstance of sale adjustments 'should be permitted if they are reasonably identifiable, quantifiable, and directly re-

lated to the sales under consideration and if there is clear and reasonable evidence of their existence and amount.'" 14 CIT at 607, 746 F. Supp. at 1103 (quoting H.R. REP. No. 96–317, at 76 (1979) * * *). The reintegro rebate was both identifiable and quantifiable, based on evidence presented to Commerce by Siderca. As stated above, the reintegro was also directly related to the sales under consideration. Therefore, Commerce's determination that the different rebate amounts constituted different circumstances of sale was a reasonable application of the statute.

Siderca argues that under *Mantex, Inc. v. United States*, 17 CIT 1385, 841 F. Supp. 1290 (1993), Commerce may only make a circumstance of sale adjustment if a causal link is established between the differing circumstances of sale and the differing amounts of FMV and USP. In *Mantex*, the court affirmed Commerce's decision not to grant a COS adjustment for rebates received by a foreign manufacturer on exported goods. "[T]o be entitled to a COS adjustment," the court said, "an importer must demonstrate a 'causal link' * * * between the differences in circumstances of sale and the differential between United States price and foreign market value." 17 CIT at 1396, 841 F. Supp. at 1300 (citing *Smith-Corona v. United States*, 1 Fed. Cir. (T) at 138, 713 F.2d at 1577).

The scope of the "causal link" requirement was discussed in *Brother Industries Ltd. v. United States*, 3 CIT 125, 540 F. Supp. 1341 (1982), *aff'd sub nom. Smith-Corona Group v. United States*, 1 Fed. Cir. (T) 130, 713 F.2d 1568 (1983), *cert. denied* 465 U.S. 1022, 1045 S. Ct. 1274 (1984). The *Brother* court stated, "it must be stressed that the statute requires only that a causal link be established to the *satisfaction of the administering authority*." 3 CIT at 130, 540 F. Supp. at 1349 (emphasis in original). Also, "if there are differences in circumstances of sale, and if there is also a price differential, then the administering authority will be satisfied that there is a causal connection between those events upon a showing * * * that the costs to the seller are different, * * *." *Id.* at 131, 540 F. Supp. at 1350.

Mantex did not diminish Commerce's discretion to find that a causal link exists when costs to the seller are different in different markets; *Mantex* simply says that Commerce does not have to make such a finding. *See* 17 CIT at 1398, 841 F. Supp. at 1302 ("[A]lthough [the rebate at issue] may explain the company's lower United States price relative to its home market, Commerce is not required to assume such a causal relationship exists.")

The reasoning of *Smith-Corona* supports Commerce's COS adjustment in this case. *See Smith-Corona*, 1 Fed. Cir. (T) at 139, 713 F.2d at 1577 n.26 ("[A]bsent evidence that costs do not reflect [FMV], the Secretary may reasonably conclude that cost and value are directly related."); *see also Daewoo Elecs. Co. v. Int'l Union*, 6 F.3d 1511, 1518–19 (Fed. Cir. 1993), *cert. denied* 114 S. Ct. 2672 (1994)(holding that Commerce need not conduct an econometric study to measure the pass-through of indirect taxes to home market consumers).

The difference in costs for sales to the United States and costs for sales to the PRC due to the different rebate amounts was amply demonstrated by Siderca's own submissions and verified by Commerce staff. (Commerce Verification Mem., April 26, 1995 at 13 (Mem. of U.S. Steel Group Opp'n. Mot. J. Agency R. Siderca, Tab 5)) ("We tested the actual receipt of payments from the government to Siderca for export sales to both the U.S. and China."). Siderca's submissions also support Commerce's finding that the tax rebate amounts are reflected in the price of the finished product. Siderca specifically stated in its response to Section C of Commerce's questionnaire that "[b]ecause indirect taxes are rebated on all exports * * * the *price* for the merchandise sold in the comparison market (China) does not include any indirect taxes." (Def.'s Ex. 9 at 18–19) (emphasis added). Furthermore, in its brief to this Court, Siderca describes the reintegro system as one in which taxes which are "imbedded in the finished product produced and sold in the domestic market * * *" are rebated to "reduce or eliminate any disadvantage that the country's exporters otherwise would face in export markets as a result of these domestic indirect taxes." (Siderca's Mot. for J. Agency R. at 5).[8]

2. Siderca also argues that Commerce's circumstance of sale adjustment "is [b]ased on a [s]erious [m]isinterpretation of [r]ecord [f]acts." *Id.* at 25. Specifically, Siderca claims that much of the pipe sold in the United States during the period of investigation was exported from Argentina before the rebate for the U.S. market was lowered to 8.3 percent. *Id.* at 25. "Simply stated, the 'difference in export rebates' which the Department explained as its sole justification for its circumstance of sale adjustment simply did not exist for much of the Siderca pipe sold in the U.S. during the period of investigation." *Id.* at 25–26. As evidence for this contention, Siderca provided the Court with Argentine Resolution 1754/93.[9]

Siderca did not make this factual argument or submit the Argentine Resolution to Commerce during the administrative proceeding. Rather, Siderca contends that Commerce was aware of the Resolution and urges

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[8] Siderca argues that the only reason the Government of Argentina lowered the rebate to [8.3] percent was "Argentina's specific good-faith effort to avoid or offset a possible subsidy on products shipped to the U.S. in deference to U.S. countervailing duty law." (Siderca's Mot. J. Agency R. at 34). Siderca cites 19 U.S.C. § 1677a(d)(2)(B) for the proposition that "[w]here, as here, the exporting country reduces its effective indirect tax rebate rate with the specific intent 'to offset the subsidy received,' such reduction cannot be used to create a dumping margin where one does not otherwise exist." *Id.*

Section 1677a(d)(2)(B) says specifically that U.S. price shall be reduced by:

> the amount, if included in such price, of any export tax, duty or other charge imposed by the country of exportation on the exportation of the merchandise to the United States other than an export tax, duty or other charge described in section 1677(6)(C) of this title.

Section 1677(6)(C) refers to "export taxes, duties, or other charges levied on the export of merchandise to the United States" to offset a countervailable subsidy.

In this case Commerce did not reduce U.S. price for any export tax, duty or other charge related to the reintegro rebates. COS adjustments are made to FMV and the adjustment in this case was made to account for differing levels of tax rebates in the U.S. and Chinese markets. A reduction of a tax rebate does not constitute an export tax, duty or other charge for the purposes of 19 U.S.C. § 1677(6)(C). The COS adjustment allowed a comparison of U.S. and Chinese sales on a comparable basis. The dumping margin found by the department did not result from Siderca's acceptance of a lower rebate on U.S. sales. Rather, the dumping margin resulted from Commerce's comparison of Siderca's U.S. and Chinese prices on a comparable basis after adjusting for tax differences.

[9] According to the English translation provided by Siderca, Resolution 1754/93 officially set the reimbursement level for exports of OCTG to the U.S. at [8.3] percent. By its own terms, the resolution did not come into force until its publication date, Jan. 4, 1994. (Pls.' App. 5.)

the Court to take judicial notice of it as a foreign official record. However, even if the Court were to take judicial notice of the Resolution, the Court could not just accept Siderca's claim that it received the full 15-percent rebate on POI sales to the United States. According to a 1995 letter from the Government of Argentina, responding to Commerce's 1993 countervailing duty investigation, although the reintegro rate for exports to the United States was formally set at 8.3 percent by Resolution 1754/93, "Siderca * * * agreed to repay the difference between the two rates [(the nominal 15 percent rate and the requested 8.3 percent rate)] for exports to the United States between November 1, 1992 and January 4, 1994." (Mem. U.S. Steel Group Opp'n. Mot. J. Agency R. Siderca, Ex. 1).

It would be inappropriate for this Court to usurp Commerce's investigatory role by delving beyond the record to decide this factual issue. Moreover, it is not necessary for the Court to pursue this inquiry.

In its questionnaire response, Siderca reported that the reintegro rate for exports of OCTG to China was 14.75 percent, and the rate for exports to the United States was 7.8 percent. *Id.* at Tab 1 (Attach. D–19). These figures were verified by Commerce. It is on the basis of this information that Commerce made its COS adjustment to FMV. Thus, Commerce's determination that Siderca received different rebates on its United States and Chinese sales during the period of investigation was supported by substantial evidence, provided by Siderca, on the record. Therefore, the Court will not disturb that determination.

3. Finally, Siderca argues that Commerce never gave Siderca an opportunity to comment on the circumstance of sale adjustment, and for that reason, the adjustment was procedurally unfair. Siderca's Mot. J. Agency R. at 27. According to Siderca, "[the Department] announced a completely new approach to an important issue for the first time in its final determination, after all opportunity for comment and argument had passed." *Id.*

The record shows, however, that Siderca was aware that the difference in tax rebates could be an issue in this investigation. On March 2, 1995, after publication of the Preliminary Determination and before Commerce conducted its on-site verification, counsel to a co-petitioner submitted a letter to the Department suggesting avenues of inquiry for the forthcoming verification. (Letter from Wiley, Rein & Fielding to Secretary of Commerce of March 2, 1995, Prop. Doc. 60, Def.'s Ex. 14). In that letter, counsel framed the rebate issue as one concerning sales, and not cost, stating in relevant part:

> I. *SALES VERIFICATION*
>
> A. *The "Reembolso" (rebates)*
>
> In its preliminary determination, the Department did not adjust U.S. and third country prices for rebated indirect taxes, contrary to long-standing Department practice and precedent. *According to the company's own figures* Siderca receives an average of US$40/ton more in rebates on its sales to China than sales to the United States. In cases where third country sales

> are being used as the basis for FMV, and there is a significant differential in the amount of rebated duties or taxes between the markets, the Department adjusts the prices in both markets by the amount of the rebates (citations omitted).

Id. at 2 (emphasis supplied).

Siderca demonstrated its awareness of petitioner's letter by responding to the letter in its rebuttal brief, "[P]etitioners * * * [argue] that the prices in a price-to-price comparison should be adjusted for the rebated taxes. * * * Based on the final determination and the Department's calculation memorandum, this appears to be an incorrect interpretation." Siderca's Rebuttal Br. at 51 n. 116.

Siderca also had ample opportunity to present exactly the factual evidence it is trying to present here. Commerce specifically asked that Siderca "[s]tate the amount of indirect taxes applicable to each sale, whether or not included in the price," for both Chinese and U.S. sales. Antidumping Req. Info., attached to Aug. 26 Letter, Antidumping Duty Investigation of Oil Country Tubular Goods (OCTG) from Argentina, App. I, Section B–1, field 17; and App. I, Section C–1, field 16. Instead of supplying this information, Siderca merely stated that no adjustment to U.S. price was necessary "since the taxes are rebated on all export sales and the price for the merchandise sold in both the U.S. and China are exclusive of the indirect taxes." (Siderca's Resp. to section B of the Department's questionnaire at 6)(Conf. App. To Br. U.S. Steel in Supp. Mot. J. Under Rule 56.2, Tab 3). In addition, Department of Commerce regulations permit any interested party to make a submission to rebut, clarify, or correct factual information submitted by an interested party within 10 days of service of the submission. *See* 19 C.F.R. § 353.31(a)(2). Siderca never challenged the factual supposition underlying petitioner's suggestion, that different reintegro rates were applied to Siderca's Chinese and U.S. sales during the period of investigation. Instead, Siderca made a legal argument that the statute does not permit an adjustment for indirect taxes when FMV is based on third-country sales.

Because Siderca had ample notice that the difference in tax rebates was an issue in Commerce's investigation, and because Commerce specifically asked for the information necessary to make a determination on this issue, this case is distinguishable from the cases cited by Siderca: *Usinor Sacilor, Unimetal and Ascometal v. United States*, 893 F. Supp. 1112 (CIT 1995), *British Steel PLC v. United States*, 879 F. Supp. 1254 (CIT 1995), *Creswell Trading Co., Inc. v. United States*, 15 F.3d 1054 (Fed. Cir. 1994) and *Sigma Corp. v. United States*, 17 CIT 1288, 841 F. Supp. 1255 (1993), in which Commerce's determinations were remanded to correct procedural unfairness.

Petitioners' Cost of Production Issues

A. *Siderca's Fixed Factory Overhead Costs:*

Plaintiffs, the Petitioners at the administrative level alleged that Siderca's prices to China were below the cost of production (COP). Commerce used Siderca's cost data to calculate the cost of production for the

OCTG sold to the PRC, and determined that there were no below-cost sales.[10]

In its Section D questionnaire, Commerce requested Siderca to submit cost of production figures including fixed and variable costs. Siderca's accounting system assigns only materials costs and variable costs to individual units of merchandise, and not fixed costs. (Dep't Commerce Verification of COP and CV Data at 7 (April 26, 1995) (Defs' Ex. 16)). "As a general rule, Commerce considers variable factory overhead costs to be those cost items which are a function of the production levels. Fixed factory overhead costs are those costs that do not vary as production levels increase or decrease." (Def.'s Mem. Opp'n. Mot. Siderca Partial Opp'n. Mot. U.S. Steel Group J. Upon the Agency R. at 49, n. 33). To comply with Commerce's request, Siderca allocated the actual fixed costs to specific cost centers and then allocated those costs to individual products based on the products' budgeted machine hours and productivity (tons/machine hour) for the given cost center.

Plaintiffs charge that Siderca's reported product-specific fixed costs were not reflective of Siderca's actual costs. (Mot. U.S. Steel Group A Unit of USX Corp., USS/Kobe Steel Co., and Koppel Steel Corp. J. Under Rule 56.2 at 26–36). "[T]he allocation system calculated Siderca's product-specific fixed costs based on *budgeted*, rather than actual, operating hours and *standard*, rather than actual, productivity rates." *Id.* at 27 (emphasis in original). Due to Siderca's use of budgeted hours and standard productivity rates, Commerce was unable to reconcile Siderca's questionnaire response to its financial statements, which reflect actual costs. *See* Final Det. at 33,548.

"Where a respondent submits information that cannot be verified," plaintiffs argue, "the Department must use best information otherwise available ("BIA")(Pls.' Mot. at 36). Commerce responds that although it could not reconcile the data submitted by Siderca, it performed three alternative verification procedures to test Siderca's allocation methodology for fixed costs. "These alternative verification procedures gave Commerce a 'reasonable assurance of the accuracy' of the respondents' reported costs * * *." (Def.'s Mem. in Opp'n. Mot. Siderca S.A.I.C. and Siderca Corp. and Partial Opp'n. Mot. U.S. Steel Group a Unit of USX, Corp., et. al. for J. Agency R. at 60).

The antidumping law requires that Commerce verify all information relied upon in making a final determination in an investigation. 19 U.S.C. § 1677e. In publishing its determination Commerce is to "report the methods and procedures used to verify such information." 19 U.S.C. § 1677e(b). The statute does not specify how verification is to be accom-

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[10] Preliminary Determination. 60 Fed. Reg. at 6505.

Under 19 U.S.C. § 1677b(b), if Commerce determines that sales made at less than cost of production "(1) have been made over an extended period of time and in substantial quantities, and (2) are not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade * * *" it must disregard such sales when determining FMV. If the remaining above-COP sales were insufficient for determining FMV, Commerce would have calculated FMV on the basis of constructed value (CV) for the OCTG models sold to the United States and compared the CV-based FMV with the United States price. Because Commerce found that the sales to China were not below-COP, it did not need to compare CV-based FMV with USP. Thus, CV is not involved in this case.

plished. It does stipulate that "[i]f the administering authority is unable to verify the accuracy of the information submitted, it shall use the best information available to it as the basis for its action, * * *." *Id.* Here, as an alternative verification procedure, Commerce compared Siderca's average company-wide fixed costs per ton to the per-unit fixed costs allocated by Siderca to the subject merchandise. This comparison led Commerce to conclude that Siderca's allocation of fixed costs was reasonable. Commerce also verified that the fixed costs were assigned to individual cost centers and allocated to each product using productivity ratios used in the allocation of variable costs. (Def.'s Mem. Opp'n. Mot. Siderca S.A.I.C. and Siderca Corp. and Partial Opp'n. Mot. U.S. Steel Group a Unit of USX, Corp., et al for J. Agency R. at 51).

"Congress has afforded ITA a degree of latitude in implementing its verification procedures * * *. The decision to select a particular method of verification rests solely within the agency's sound discretion." *Floral Trade Council v. United States*, 17 CIT 392, 399, 822 F. Supp. 766, 772 (1993)(upholding the ITA's decision not to apply BIA based on ITA's claim that it was able to verify respondent's questionnaire response through "alternative means")(citations omitted); *see also American Alloys, Inc. v. United States*, 30 F.3d 1469, 1475 (Fed. Cir. 1994) ("[T]he statute gives Commerce wide latitude in its verification procedures.").

In this case, Commerce relied on Siderca's normal accounting practices and then verified Siderca's cost data reporting and cost accounting system. The Court finds that Commerce's alternative verification methods were adequate under the circumstances and represented a reasonable application of 19 U.S.C. §1677e.

In addition to the requirement that Commerce's interpretation of the antidumping statute be reasonable, the law requires that Commerce's factual findings be supported by substantial evidence on the agency record. *See* 19 U.S.C. § 1516a(b)(1)(B). The "reasonableness test" conducted by Commerce showed that Siderca's reported fixed costs for the subject merchandise were different than its company-wide per-unit fixed costs. Commerce accepted Siderca's explanation that the discrepancy was due to the difference between the mix of products manufactured for export to the United States and the PRC and Siderca's overall product mix.

The Court finds that there is sufficient evidence on the record demonstrating Siderca's company-wide product mix and the mix of products contained in the subject merchandise to support Commerce's determination. Specifically, Siderca's production report for fiscal year 93/94, discussed by Commerce in its verification report, demonstrates that there was no significant difference between Siderca's budgeted and real production during the relevant period. Under the heading *"Facturable Por Producto,"* the report shows a breakout of production by product type, and by end finish. Summing the actual production of plain end casing and plain end tubing yields a total plain end production of 66,616 tons, approximately 10 percent of Siderca's total actual production.

(Siderca S.A.I.C. Cost Verification Ex. 12)(Mem. P & A of Def.-Ints. Siderca S.A.I.C. and Siderca Corp. Opp. Pls.' Mot. J. Agency R., App. 8). This supports Siderca's statement that "approximately 10 percent of Siderca's production is plain end pipe." (Siderca's Case Brief at 29). Siderca's related statement, that "virtually 50 percent of the merchandise sold to the United States is plain end * * *," *id.* at 30, is supported by Siderca's explanation that it ships plain end pipe to the United States for threading at its manufacturing facilities in Houston. (Siderca's Section E Response at 4, Nov. 10, 1994). That explanation is supported by Siderca's U.S. sales listing. (Def.'s Ex. 14 of Prop. Doc. 32)).

Accordingly, the Court finds that Commerce's use of alternative verification methods was a permissible construction of the antidumping statute, and that Commerce's determination as to Siderca's allocation of fixed costs was supported by substantial evidence on the record.

B. *The Use of Miscellaneous Income to Offset Siderca's General Expenses:*

In calculating cost of production, Commerce adds to the producer's cost of manufacture (materials, labor and overhead costs) an amount for general and administrative expenses. "General and administrative expenses (G & A) are an element of COP and consist of those expenses which relate to the activities of the company as a whole, rather than to the production process." (Def.'s Mem. Opp'n. Mot. Siderca S.A.I.C. and Siderca Corp. and Partial Opp'n. Mot. U.S. Steel Group a Unit of USX, Corp., et. al. J. Agency R. at 65).

In calculating Siderca's cost of production Commerce offset general and administrative expenses with "miscellaneous income" comprised of revenues from the sale of intermediate products such as sponge iron, bar, and other miscellaneous products; sales of OCTG purchased from other countries and resold in other countries; and sales of technical assistance to other steel companies. (Rebuttal Br. on Behalf of Siderca S.A.I.C. and Siderca Corp. at 58–59 (May 17, 1995)(Def.'s Ex. 18)).

According to Commerce's final determination, "miscellaneous income relating to production operations *of the subject merchandise* may be permitted as an offset to G&A." Final Det. at 33550 (citing *Saccharin from Korea*, 59 Fed. Reg. 58,826, 58,828 (Dep't Commerce 1994)(final det.)(emphasis added). The court finds that this approach represents a permissible construction of the statute and a longstanding agency practice.[11] The antidumping law itself does not define cost of production nor does it include a discussion of [miscellaneous profit] as an offset to cost. When a statute is silent or ambiguous, the court must defer to Commerce's reasonable interpretation. *Daewoo Elec. Co., Ltd. v. Int'l. Union*

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[11] *See Saccharin from Korea*, 59 Fed. Reg. 58826, 58828 (Dep't Commerce 1994)(final det.)("[M]iscellaneous income should be permitted as an offset to G&A *because this income is related to [respondent's] production operations.*")(emphasis added); *Polyethylene Terephthalate Film, Sheet, and Strip from the Republic of Korea*, 56 Fed. Reg. 16,305, 16,317 (Dep't Commerce 1991)(final det.)("[Respondent] did not establish during verification that its recorded miscellaneous income and expense amounts were related to the company's PET film production. We therefore excluded the net income amount from Cheil's general expenses.")

of Electronic Elec., Technical, Salaried and Mach. Workers, 6 F.3d at 1516.

However, Commerce's determination must also be supported by substantial evidence. Commerce failed to cite evidence in the Final Determination to support the notion that Siderca's miscellaneous sales were related to the production operations of the subject merchandise. Siderca's practice of including the costs related to these sales in its production costs is not enough.[12]

In its memorandum to this Court, Defendant revised its statement of the legal standard for allowing offsets to general and administrative costs. Defendant argues that, "[i]t is Commerce's practice, * * * to permit offsets to expenses for revenue relating to the respondent's general production operations." (Def.'s Mem. Opp'n. Mot. Siderca S.A.I.C. and Siderca Corp. and Partial Opp'n. Mot. U.S. Steel Group a Unit of USX Corp., et. al. J. Agency R. at 67). However, it is not clear to the Court that this is actually Commerce's usual practice. The three cases cited by Commerce involved offsetting interest expenses with interest income.[13] As petitioners note, interest income and expense are usually related to general production operations because the Department has reasoned that money is fungible.[14] Thus these cases are not relevant to the issue before the Court.

Furthermore, the legal standard articulated in Commerce's memorandum to the Court was not the same as that set out in the Final Determination. "Post-hoc rationalizations of agency actions first advocated by counsel in court may not serve as the basis for sustaining the agency's determination." *U.H.F.C. Co. v. United States*, 9 Fed. Cir. (T) 1, 13, 916 F.2d 689, 700 (1990) (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 83 S. Ct. 239, 246 (1962); *Atcor, Inc. v. United States*, 11 CIT 148, 153, 658 F. Supp. 295, 299 (1987)).

Therefore, this issue is remanded so that Commerce can reconsider its treatment of Siderca's miscellaneous income.

C. *Adjustment of COP for Reintegro Tax Rebate:*

As explained above, the Argentine government imposes a series of indirect taxes at various stages of production, which become embedded in the price of the product at each stage and are passed on to the next stage of production through the price of the intermediate product. Under the reintegro program these taxes are rebated for merchandise produced for export. In calculating Siderca's cost of production, Commerce deducted the full amount of the rebate Siderca received for its sales to the PRC.

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[12] *See e.g.* Certain Fresh Cut Flowers From Columbia, 61 Fed. Reg. 42833, 42843 (Dept. of Comm. Aug. 19, 1996)(final det.)(refusing to allow revenues from cuttings, other materials, or sales of services to be used to offset constructed value).

[13] The cases cited by Commerce were *Timken Co. v. United States*, 18 CIT 1, 852 F. Supp. 1040 (CIT 1994); *Floral Trade Council of Davis, Cal. v. United States*, 15 CIT 497, 775 F. Supp. 1492 (1991); and *NTN Bearing Corp. v. United States*, 905 F. Supp. 1083 (CIT 1995).

[14] *See* Certain Small Business Telephone Systems and Subassemblies Thereof from Korea, 54 Fed. Reg. 53141, 49 (Dep't. Commerce 1989) (final det.).

In response to plaintiffs' argument that Commerce should only deduct that part of the rebate attributable to taxes on material inputs of the subject merchandise, Commerce explained:

> the Department's Offices of Countervailing Investigations and Countervailing Compliance normally test to determine whether or not the reintegro is countervailable * * *. To be non-countervailable, the rebate must be for taxes on merchandise which was physically incorporated into the exported product and the rebate must be no greater than the actual taxes imposed. * * * In [1991], the Department determined that Siderca was entitled to the entire reintegro without incurring countervailing duties.

Final Determination at 33,546. The reimbursement percentage on OCTG was raised in 1992, but Siderca only accepts the pre-1992 rebate percentage on U.S. sales because the countervailing duty order is still in place. "Based on the fact that the Department has previously determined that Siderca was entitled to a rebate without incurring countervailing duties and because [Siderca] currently accepts a lower rebate, it is reasonable to assume that the entire reintegro is attributable only to material inputs." *Id.*

Commerce's explanation is insufficient. The tax rebate on exports to the United States was only 12.5 percent in 1989, the year for which Commerce determined that the rebate was not countervailable. (Siderca's Mot. J. Agency R. at 9, n. 11). The subsidy on PRC exports is 15 percent. Therefore, it is not reasonable for Commerce to assume that the entire amount of the PRC rebate is attributable to material inputs. Furthermore, Siderca acknowledged that the reintegro rebates taxes on various cost elements other than material inputs. (Mem. P&A Def.-Ints. Siderca S.A.I.C. and Siderca Corp. Opp'n Pls.' Mot. J. Agency R. at 30).

Pursuant to Commerce's request, the Court is remanding this issue to give Commerce an opportunity to correct this error and to more plainly articulate its standard for adjusting Siderca's costs for the amount of the rebate received.

CONCLUSION

For the reasons stated above, Commerce's determination is affirmed with respect to the circumstances of sale adjustment and the use of Siderca's allocated fixed costs in calculating Siderca's cost of production. Commerce's determination is remanded with respect to the treatment of miscellaneous income and the adjustment of Siderca's cost of production to account for the reintegro rebate.

(Slip Op. 97–96)

H.I.M./FATHOM, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 92–12–00808

Plaintiff challenges the United States Customs Service's ("Customs") classification of its import merchandise, including wetsuits, wetsuit shoes, wetsuit headgear, wetsuit gloves and weight belts as "garments" under headings 6113 and 6114, 6404.19.80, 6505.90.60, 6116.10.25 and 6217.10.00, respectively, of the Harmonized Tariff Schedule of the United States ("HTSUS"). Plaintiff contends its imports are properly classified as "other water-sport equipment" under HTSUS Chapter 95.

Held: Customs properly classified plaintiff's import wetsuits, wetsuit shoes, wetsuit headgear and wetsuit gloves as garments under HTSUS headings 6113 and 6114, 6404.19.80, 6505.90.60 and 6116.10.25, respectively. Plaintiff's import weight belts are properly classified under HTSUS 9506.29.00.

[Plaintiff's motion for summary judgment granted in part and denied in part. Case dismissed.]

(Dated July 14, 1997)

Sandler, Travis & Rosenberg, P.A. (Leonard L. Rosenberg and *Paul G. Giguere)* for plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Bruce N. Stratvert);* of counsel: *Mark G. Nackman,* Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service, for defendant.

OPINION

TSOUCALAS, *Senior Judge:* Plaintiff, H.I.M./Fathom ("Fathom"), challenges the United States Customs Service's ("Customs") classification of its import merchandise, including wetsuits, wetsuit shoes, wetsuit headgear, wetsuit gloves and weight belts as "garments"[1] under headings 6113 and 6114, 6404.19.80, 6505.90.60, 6116.10.25 and 6217.10.00, respectively, of the Harmonized Tariff Schedule of the United States ("HTSUS") (1990). Plaintiff contends its imports are properly classified as "other water-sport equipment" under HTSUS Chapter 95. The Court has jurisdiction over this matter under 28 U.S.C. § 1581(a) (1994).

BACKGROUND

The main products at issue are closed-cell neoprene rubber wetsuits, consisting of a neoprene and textile laminate manufactured in St. Lucia, West Indies. The laminate is made of chemically blown closed-cell neoprene rubber compressed between layers of textile. The wetsuits at issue are made of two kinds of material: (1) "Seaflex," a neoprene rubber layer laminated with a knit fabric on both the interior and exterior surfaces; and (2) "Durasoft," a neoprene rubber layer laminated with a plush or pile material on the interior surface. The material comes in thicknesses of 1/8″, 3/16″ or 1/4″, depending on the type of water in which the suit is intended to be used. Stitching and neoprene rubber ce-

[1] For simplification, this opinion will refer to HTSUS Chapters 61, 62, 64 and 65 as "garment" provisions.

ment are used to assemble the suits. The shoes, headgear and gloves consist of basically the same material as the wetsuits.

The wetsuit material insulates the body through the layer of water that enters the space between the suit and the wearer while diving. When the wearer's body and the layer of water caught between the interior surface of the suit and the wearer's skin reach an equilibrium temperature, heat loss is reduced. *Customs Ruling 088542*, Pl.'s App., Ex. A, at 1 (May 1, 1992).

Customs classified the merchandise at issue as garments in the following manner: (1) the Seaflex wetsuits under HTSUS heading 6113, with a duty of 7.60 percent *ad valorem*; (2) the Durasoft wetsuits under HTSUS heading 6114, with a duty of 16.10 percent *ad valorem*; (3) the wetsuit shoes under HTSUS 6404.19.80, with a duty of 20 percent *ad valorem*; (4) the wetsuit headgear under HTSUS 6505.90.60, with a duty of 14.10 percent *ad valorem*; (5) the wetsuit gloves under HTSUS 6116.10.25, with a duty of 19.80 percent *ad valorem*; and (6) the weight belts under HTSUS 6217.10.00, with a duty of 15.50 percent *ad valorem*. Upon review of Fathom's protest, which alleged the merchandise is properly classified under Chapter 95, Customs denied the protest in full. *See id.*

In its denial, Customs discussed the scope of HTSUS heading 9506, articles and equipment for sports, and determined that the Explanatory Notes demonstrate the limitation of Chapter 95 to "apparatus and appliances." *Id.* at 4. Given this limitation, and the specific exclusion of "[s]ports clothing" by Chapter Note 1(e) to Chapter 95, Customs stated that all sports clothing, including protective garments, are excluded from the chapter. *Id.* Customs also noted that, as an *eo nomine* provision, Chapter 95 is clear in its scope and the wetsuits are not the type of article meant to be included in the chapter. *Id.* at 4–5.

Further, with regard to HTSUS Chapter 61, Customs determined that headings 6113 and 6114 include "divers' suits," as well as other similar merchandise, as articles classified as garments. *Id.* at 6. Customs noted that protective sports clothing not worn for "decency, comfort or adornment," which distinguished wearing apparel under the Tariff Schedule of the United States ("TSUS"), can nevertheless be classified as garments under the HTSUS. *Id.* Finally, Customs explained that the "use" test is not applicable in this case. *Id.*

Fathom now appeals Customs' denial of its protest, challenging Customs' classification of its imported merchandise and claiming its wetsuits and related merchandise are properly classified under HTSUS 9506.29.00:

9506	Articles and equipment for gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof:

* * * * * * *

	water skis, surfboards, sailboards and other water-sport equipment; parts and accessories thereof:	
* * * * * * *		
9506.29.00	Other	4.64%

Under Fathom's proposed classification, the merchandise at issue would be dutiable at 4.64 percent *ad valorem* or free of duty under the provisions of the Caribbean Basin Economic Recovery Act. Fathom moves this Court for summary judgment and defendant cross-moves for summary judgment.

DISCUSSION

On a motion for summary judgment, the Court must consider whether a case presents any issues of genuine material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). If there are no such issues, summary judgment is appropriate when the movant is entitled to judgment as a matter of law. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). The meaning of a tariff term is a question of law to be decided by the Court, whereas the determination of whether a particular article fits within that meaning is a question of fact. *Hasbro Indus., Inc. v. United States*, 879 F.2d 838, 840 (Fed. Cir. 1989). In this case, because the Court finds there are no genuine issues of material fact to be decided and the dispositive issues to be resolved are legal, summary judgment is appropriate.

Pursuant to 28 U.S.C. § 2640(a) (1994), Customs' classification decision is subject to *de novo* review. The Court must determine "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984). In cases such as this, where there is no factual dispute between the parties, Customs' presumption of correctness is irrelevant. *Goodman Mfg., L.P. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995); *see also Rollerblade, Inc. v. United States*, 112 F.3d 481, 484 (Fed. Cir. 1997) (stating that, where there are no disputed issues of material fact, "no deference attaches to Customs' classification decisions either under 28 U.S.C. § 2639 or under [the] *Chevron* [doctrine]").

The definition and scope of terms in a provision of the HTSUS is to be determined by the wording of the statute. *Lynteq, Inc. v. United States*, 976 F.2d 693, 696 (Fed. Cir. 1992); Gen. R. Interp. 1, HTSUS. However, if a tariff term is not clearly defined by the HTSUS, and if legislative history is not determinative of its meaning, its correct meaning is resolved by ascertaining its common and commercial meaning. *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994); *see also Amity Leather Co. v. United States*, 20 CIT ___, ___, 939 F. Supp. 891, 894 (1996). To determine the common meaning of a tariff term, the Court may utilize standard dictionaries and scientific authorities, as well as its own understanding of the term. *Lynteq*, 976 F.2d at 697.

In its determination of the definition of tariff terms, the Court may also utilize the Explanatory Notes. Explanatory Notes which are published by the World Customs Organization (formerly known as the Customs Co-operation Council), provide guidance in interpreting the language of the HTSUS. *See Bausch & Lomb, Inc. v. United States*, 21 CIT ____, ____, 957 F. Supp. 281, 288 (1997) (stating tariff acts must be interpreted in accordance with Congressional intent and Congress's endorsement of the Explanatory Notes demonstrates intent of Congress). Although not legally binding on the United States, the Explanatory Notes generally indicate the "proper interpretation" of provisions within the HTSUS. *Lynteq*, 976 F.2d at 699 (citing H.R. Conf. Rep. No. 100–576, 100th Cong., 2d Sess. 549 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1582); *see also Marubeni Am. Corp. v. United States*, 35 F.3d 530, 535 n.3 (Fed. Cir. 1994) (stating Explanatory Notes, while not dispositive or binding, are instructive). Additionally, in determining whether an item is properly classified under a particular heading in the HTSUS, the Explanatory Notes are persuasive authority for the Court when they specifically include or exclude an item from a tariff heading. *See, e.g.*, *Bausch & Lomb*, 21 CIT at ____, 957 F. Supp. at 288.

Fathom contends its wetsuits are not properly classified as garments because they are not personal attire. In particular, Fathom notes that the HTSUS garment headings at issue here, 6113 and 6114, fall under the category of "wearing apparel," which has been defined as articles worn for reasons of "decency, comfort and adornment." Pl.'s Mem. Supp. Mot. Summ. J. at 12–13 (citing *Antonio Pompeo v. United States*, 40 Cust. Ct. 362, 365, C.D. 2006 (1958)). In addition to this definition, Fathom asserts that the wearing apparel category has been interpreted to exclude articles worn in a sport or occupation to protect against hazards of a game, sport or occupation. *Id.*

Fathom proposes that its import wetsuits are properly categorized under HTSUS 9506.29.00 because, simply, they constitute sports equipment used in scuba diving, a water-sport activity. *Id.* at 18. Fathom cites case law asserting that an item is classified as sports equipment based on the special design of the article as related to a particular sport for which it is intended. *Id.* (citing *Sports Indus., Inc. v. United States*, 65 Cust. Ct. 470, 473–74, C.D. 4125 (1970)). Since there is no doubt as to the design of wetsuits for use in the water-sport of scuba diving, Fathom contends its imports fall under Chapter 95. *Id.*

Accordingly, Fathom makes the same argument for the classification of the shoes, headgear and gloves because they are made of the same material as the wetsuits and are used for the same purpose. *Id.* at 21. Fathom further contends that the weight belts should be classified under HTSUS subheading 9506.29.00 because they are similar to divers' weight belts, which have been classified by Customs under that subheading in three previous rulings. *Id.*

Fathom rebuts the Customs Ruling's assertion that use analysis is not applicable, contending it is well-established that the ultimate test of

whether an article is to be considered wearing apparel depends on its use. *Id.* at 13 (citing *Admiral Craft Equip. Corp. v. United States*, 82 Cust. Ct. 162, 164, C.D. 4796 (1979)). Fathom states that, although an article resembles the wearing apparel characteristics, its use may be beyond the scope of the wearing apparel category under the *Carborundum* criteria,[2] particularly where the article serves a protective function against serious injury. *Id.* at 14 (citing *Dynamics Classics, Ltd. v. United States*, 10 CIT 666, 669–70 (1986) (holding plastic exercise suits not classified as wearing apparel because chiefly used for weight reduction and not suitable for wear during exercise or work)). In applying the *Carborundum* criteria to its wetsuits, Fathom concludes that, because the use and physical characteristics of wetsuits are to protect the wearer from hypothermia and other hazards in the sport of scuba diving, the wetsuits are "far beyond the common and judicial understanding of wearing apparel," which encompasses articles worn for decency, comfort and adornment. *Id.* at 17.

Fathom also contends that Customs' use of the Explanatory Notes to preclude the wetsuits from classification under Chapter 95 and to include them under Chapter 61 is erroneous. Fathom states that since the case law regarding wearing apparel is determinative, the Explanatory Notes are secondary. *Id.* at 15. Moreover, Fathom notes that Customs' categorization of the wetsuits by their similarity to articles listed in the Explanatory Notes to Chapter 61, and their exclusion based on their dissimilarity to the articles listed in the Explanatory Notes to Chapter 95, is a tenuous argument contrary to case law. *Id.* at 14–15.

Customs maintains its classification is correct because the language of the HTSUS in the chapter heading and notes of Chapter 61 clearly includes the merchandise and because the wording of Chapter 95 specifically excludes the merchandise. Def.'s Mem. in Supp. Mot. Summ. J. at 11–13. Customs further contends that, in accordance with Rule 1 of the HTSUS General Rules of Interpretation ("GRI"), only merchandise deemed "articles and equipment" for "athletics" or for "other sports" or "parts and accessories thereof" can be classified under heading 9506. *Id.* at 11.

In addition, Customs claims that the shoes, headgear and gloves were classified appropriately under the garment headings of the HTSUS because the items serve the same function as the wetsuits: "comfort and protection" in the sport of scuba diving. *See id.* at 11–14. Customs also notes that the language of the HTSUS requires classification of the shoes, headgear and gloves under the garment provisions because they are excluded by Chapter Notes 1(g), 1(q) and 1(u) to Chapter 95. *Id.* at 12–14. Customs concedes that the import weight belts are properly classified under HTSUS 9506.29.00 *Id.* at 6. Finally, Customs distinguishes the TSUS case law to which Fathom cites and bolsters its position with

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[2] The *Carborundum* criteria for chief use, first enunciated in *United States v. Carborundum Co.*, 536 F.2d 373, 377 (C.C.P.A. 1976), are: (1) general physical characteristics; (2) expectations of the purchaser; (3) channels of trade; and (4) advertising and use of merchandise.

language from the Explanatory Notes to Chapters 61 and 95. *See id.* at 15–17, 18.

The language of a statute is determinative unless legislative intent is clearly in contrast. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Amity Leather*, 20 CIT at ____, 939 F. Supp. at 895 (citing *Lynteq*, 976 F.2d at 696). Under GRI 1, the classification of an article is "determined according to the terms of the headings and any relative section or chapter notes." Customs' classification is correct because the terms of the headings and sections in Chapter 61 clearly bring the wetsuits within the ambit of the chapter.

The plain meaning of the tariff language to Chapter 61 explicitly includes articles composed of the wetsuit material. The tariff language to Chapter 61 states, in relevant part:

6113.00.00	Garments, made up of knitted or crocheted fabrics of heading 5903, 5906 or 5907	7.6%
*	* * * * * * *	
6114	Other garments, knitted or crocheted:	
*	* * * * * * *	
6114.30	Of man-made fibers:	
6114.30.30	Other	16.1%

A garment is defined as "an article of outer clothing (as a coat or dress) usu. exclusive of accessories." **Webster's Third New International Dictionary** 936 (1993). Clothing is defined as "covering for the human body or garments in general: all the garments and accessories worn by a person at any one time." *Id.* at 428. The wetsuits are undeniably articles worn as an outer covering for the human body at a particular time, *i.e.*, while scuba diving. Although wetsuits are not specifically mentioned in the HTSUS garment provisions, heading 6113 specifically includes garments made of knitted or crocheted fabrics provided for in headings 5903, 5906 or 5907. Headings 5903, 5906 and 5907 encompass the wetsuit material of closed-cell foamed neoprene. Heading 5903, for example, includes "[t]extile fabrics impregnated, coated, covered or laminated with plastics." Further, heading 5906 encompasses "[r]ubberized textile fabrics, other than those of heading 5902." Similarly, heading 6114 refers to "[o]ther garments, knitted or crocheted."

Further, the section notes to Section XI (Textiles and Textile Articles), which encompass Chapters 50–63, indicate that the wetsuits are not excluded from the chapter. Section Note 1(t) explicitly states that the section does not cover "[a]rticles of chapter 95 (for example, toys, games, sports requisites and nets)." Hence, while sports equipment and appliances, such as toys and nets, are to be classified under Chapter 95, and not under Chapter 61, there is no mention of such classification for wetsuits or other similar items worn on the body.

The Explanatory Notes to heading 6113 also support Customs' argument that the garment chapters cover wetsuits. The Explanatory Notes state that heading 6113 "covers all garments made up of knitted or crocheted fabrics of heading 59.03, 59.06 or 59.07 * * * includ[ing] rain-

coats, oilskins, *divers' suits* and anti-radiation protective suits, not combined with breathing apparatus." *Explanatory Notes* at 842 (1st ed. 1986) (emphasis added).

The mention of divers' suits in the Explanatory Notes to heading 6113 contradicts plaintiff's contention that there is no reference to "wetsuits" in the Explanatory Notes. Indeed, Fathom accepts the role of wetsuits as "specially designed for and * * * used in * * * scuba diving." Pl.'s Mem. Supp. Mot. Summ. J. at 2. To defeat the relevance of the Explanatory Notes' inclusion of divers' suits to this case, plaintiff would have to contend that its wetsuits used in scuba diving are different from divers' suits. However, the material facts presented by plaintiff, as well as the affidavits it provides, demonstrate that for all intents and purposes the wetsuit a diver wears may be termed a diver's suit. *See id.*, Exs. C, D.

Ivan L. Perla, former president of plaintiff Fathom, specifically stated that Fathom was involved in selling and manufacturing "wet suits and other diving related equipment." *Id.*, Ex. D, at 1. Durwood J. Morin, a certified diving instructor and co-owner of an institution that teaches diving, also described the wetsuits as suits worn to protect the diver from numerous hazards. *Id.*, Ex. C, at 1. Finally, the U.S. Department of Commerce "NOAA Diving Manual" specifically describes the protective clothing worn by divers as "wet suits." Def.'s Reply Mem. Supp. Mot. Summ. J. at Ex. A., at 5–15 to 5–16.[3]

Because the shoes, headgear and gloves have composition similar to the wetsuits, the Court concludes that they are also properly classified as garments under subsections 6404.19.80, 6505.90.60 and 6116.10.25, respectively.[4] However, the Court agrees with Fathom that the weight belts should be classified under HTSUS 9506.29.00. The weight belts at issue are in all material respects identical to divers' weight belts, which have been classified by Customs under that subheading in previous rulings. *See Customs Ruling 813857*, Pl.'s App., Ex. I (Aug. 23, 1995); *Customs Ruling 895417*, Pl.'s App., Ex. H (Mar. 10, 1994); *Customs Ruling 885464*, Pl.'s App., Ex. G (May 21, 1993).

The Court finds that Fathom's wetsuits and related articles cannot properly be classified under plaintiff's proposed classification, Chapter 95. First, Chapter Note 1(e) to Chapter 95 explicitly excludes "[s]ports clothing" from the chapter, while Chapter Notes 1(g) and (u) explicitly exclude sports footwear, headgear and gloves from the chapter. Chapter Note 1(u), in particular, states that the chapter does not cover "[r]acket strings, tents or other camping goods, or *gloves (classified according to their constituent material)*" (emphasis added).

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[3] Also, despite the fact that a use analysis is not necessary, contrary to Fathom's assertion, the garment provisions of the HTSUS include certain items the principal use of which is not comfort and adornment. For example, "[n]onwoven disposable apparel designed for use in * * * contaminated areas," obviously not worn for pure decency, comfort or adornment but for protection, are classified under HTSUS 6210.10.40.

[4] In fact, the Explanatory Notes to Chapter 64 explicitly state that, with certain listed exceptions, the chapter covers "various types of footwear (including overshoes) irrespective of their shape and size, the particular use for which they are designed, their method of manufacture or the materials of which they are made." *Explanatory Notes* at 873. Similarly, the Explanatory Notes to Chapter 65 state that the chapter covers "headgear of all kinds, irrespective of the materials of which they are made and of their intended use (daily wear, theater, disguise, protection, etc.)." *Id.* at 881.

Moreover, Fathom's recourse to case law decided under the TSUS regarding wearing apparel and the use test is unnecessary and incorrect. If, as here, the statutory language within the HTSUS is clear, it is unnecessary to apply TSUS terminology.[5] *Amity Leather*, 20 CIT at ____, 939 F. Supp. at 895.

In addition, Explanatory Note 95.06(B)(13) to Chapter 95 indicates that the chapter covers "[p]rotective equipment for sports or games, [including] fencing masks and breast plates, elbow and knee pads, cricket pads, [and] shin-guards." *Explanatory Notes* at 1592. Therefore, while equipment such as padding and guards are included in the chapter, there is no mention of wetsuits or any similar article of attire. Other Chapter 95 Explanatory Notes explicitly include only water-sport equipment such as "[w]ater-skis, surf-boards, sailboards and other * * * equipment, such as diving stages (platforms), chutes, divers' flippers and respiratory masks of a kind used without oxygen * * *." *Id.*

Finally, the language of the HTSUS, in contrast to the TSUS, evidences statutory intent that articles are not classified within the garment provisions primarily based on use. While classification by use under certain sections of the HTSUS can be implied from the language of the headings, *see E.M. Chems. v. United States*, 20 CIT ____, ____, 923 F. Supp. 202, 207 (1996) (citing *E.C. Lineiro v. United States*, 37 C.C.P.A. 10, 14, C.A.D. 411 (1949) (stating that classification by use may be appropriate for a particular HTSUS provision even where the words "use" or "used" are not stated in the language of such provision)), the garment provisions involved, Chapters 61 and 62, are not use provisions. In particular, these chapters do not expressly state that classification of articles under its provisions depends upon principal use, and the terms of the headings do not imply that the garment chapters are use provisions. Rather, heading 6113 refers to garments made of materials listed in HTSUS 5903, 5906 and 5907 and heading 6114 simply refers to knitted or crocheted articles.

CONCLUSION

Consequently, the Court concludes that Customs properly classified the Fathom wetsuits, shoes, headgear and gloves under HTSUS headings 6113 and 6114, 6404.19.80, 6505.90.60 and 6116.10.25, respectively. The weight belts are properly classified under HTSUS 9506.29.00.

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[5] The Court notes that the *Sports Industries* case, heavily relied upon by Fathom as precedent regarding the use test for wearing apparel, involved sections for the classification of gloves in the TSUS that differ radically from those in the HTSUS.

(Slip Op. 97–97)

CPC INTERNATIONAL, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 95–02–00144

(Dated July 14, 1997)

Neville, Peterson & Williams (John M. Peterson, George W. Thompson, and *Arthur K. Purcell,* Esqs.), for plaintiff.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch; Jeffrey M. Telep, Esq., Civil Division, U.S. Department of Justice; *Sandra Gethers* and *David Cohen,* Esqs., Office of Regulations and Rulings, United States Customs Service, for defendant.

OPINION AND ORDER AFFIRMING REMAND RULING

I

INTRODUCTION

NEWMAN, *Senior Judge:* This case involves a challenge by plaintiff, pursuant to the court's jurisdiction under 19 U.S.C. § 1581(h), to a United States Customs Service ("Customs") preimportation ruling. Customs Headquarters Ruling Letter 557994, dated October 24, 1994 ("HRL"), ruled adversely to CPC's claimed exemption from country of origin marking of CPC's "Skippy" brand peanut butter, which product would contain a blend of Canadian-origin, as well as domestic, peanut slurry among other ingredients.

In its HRL denying exemption from marking, Customs invoked solely the Marking Rules (19 C.F.R. Part 102) and other interim amendments to the Customs Regulations implementing the North American Free Trade Agreement Implementation Act of 1993, Pub. L. 103–182, 107 Stat. 2057–2225 (December 8, 1993), *codified at* 19 U.S.C. § 3311 *et seq. See* Executive Order No. 12889, 58 Fed. Reg. 69681 (Dec. 27, 1993)("the NAFTA Implementation Act"). The NAFTA Implementation Act approved and entered into force the North American Free Trade Agreement ("NAFTA"), effective January 1, 1994. Specifically, Customs ruled that under the interim regulations, CPC's retail containers of "Skippy" peanut butter do not qualify for the exception from marking under 19 C.F.R. § 134.35(b) and the referenced NAFTA Marking Rules, 19 C.F.R. § 102.20. Applying the hierarchical analysis required by 19 C.F.R. § 102.11, Customs determined in its HRL that CPC's finished product sold at retail must be marked to disclose the Canadian-origin peanut slurry content of the product.

Customs' ruling, however, failed to also address the long-standing exception to country of origin marking claimed by plaintiff under the "ultimate purchaser" provision of 19 U.S.C. § 1304(a) and 19 C.F.R. § 134.35(a)(1985). Specifically, the issue raised by plaintiff was whether it could be deemed to be the "ultimate purchaser" of the Canadian-origin peanut slurry by applying the traditional change of name, character, or use test of substantial transformation as articulated in the oft-cited

United States v. Gibson-Thomsen Co., 27 CCPA 267. C.A.D. 98 (1940) *("Gibson-Thomsen")*, which issue was not addressed in the HRL.

In an opinion and order of July 8, 1996, this court agreed with plaintiff that Customs' HRL was contrary to law in that, in addition to the exemptions under the hierarchical analysis and Marking Rules prescribed for NAFTA goods under Customs' Interim Regulations, Customs was, notwithstanding NAFTA Interim Regulation 19 C.F.R. § 134.35(a),[1] required to determine whether CPC's finished peanut butter would be exempted from country of origin marking under the *Gibson-Thomsen* substantial transformation test of an ultimate purchaser under 19 U.S.C. § 1304(a). Consequently, the ruling was remanded to Customs. *CPC International, Inc. v. United States*, 933 F. Supp. 1093 (CIT July 8, 1996), *rehearing denied*, 956 F. Supp. 1014 (CIT Jan. 6, 1997).[2] Customs was instructed to determine on remand "whether plaintiff would be the ultimate purchaser of Canadian-origin slurry under 19 U.S.C. § 1304(a) in accordance with the *Gibson-Thomsen* substantial transformation factors." *Id.*, 933 F. Supp. at 1106.

In compliance with this court's remand order, Customs has, based upon the facts of record, considered the issues raised under the ultimate purchaser provision in § 1304(a) and issued its Remand Ruling, Customs Headquarters Ruling 559965, dated January 24, 1997 ("Remand Ruling"). The parties have submitted briefs in response to the new ruling.[3]

Citing the *Gibson-Thomsen* factors and following the substantial transformation analysis of *National Juice Products Association v. United States*, 10 CIT 48, 628 F. Supp. 978 (1986), Customs determined in its Remand Ruling that, contrary to plaintiff's contention, plaintiff would not be the ultimate purchaser of the Canadian-origin peanut slurry because the slurry would not become "a new and different article having a new name, character or use" when mixed with U.S. origin peanut slurry and other ingredients to produce "Skippy" brand peanut butter. Thus, the Remand Ruling states:

> Peanut slurry imported from Canada and processed into peanut butter in the U.S. in the manner described * * * will not result in the substantial transformation of the imported peanut slurry. Accordingly, the retail consumer is deemed to be the ultimate purchaser of

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[1] 19 C.F.R. § 134.35(a), which limits the application of *Gibson-Thomsen* to articles other than goods of NAFTA countries, was ruled to be invalid in the prior decisions in this case. It should be pointed out that, contrary to defendant's assertion, the court did not invalidate 19 C.F.R. § 134.35(a) on the ground that the North American Free Trade Agreement ("NAFTA") Marking Rules (19 C.F.R. Part 102) are applicable to NAFTA imports (which is not disputed by plaintiff). Rather, and as plainly articulated in the prior opinions in this case, the invalidity of the contested § 134.35(a) rests on the ground that under the regulation the ultimate purchaser provision under 19 U.S.C. § 1304(a), as interpreted in *Gibson-Thomsen*, was made inapplicable to NAFTA goods, in contravention of the NAFTA Implementation's Act express prohibition of implied amendments or modifications of existing law. *See* NAFTA Implementation Act, 19 U.S.C. § 3312(a). Accordingly, there is no dispute as to the validity of the NAFTA Marking Rules or their application to plaintiff's finished peanut butter in determining whether the finished product is a good of the United States for purposes of the exemption from marking under 19 C.F.R. § 134.35(b). Nonetheless, in addition to the NAFTA Marking Rules, *under existing statutory and case law* on the effective date of the NAFTA Implementation Act the "ultimate purchaser" provision under § 1304(a), construed in accordance with the substantial transformation test articulated in *Gibson-Thomsen*, remains a viable case specific basis for exemption from country of origin marking of NAFTA goods.

[2] The administrative background of the HRL and issues addressed by Customs and this court are set forth in the two prior opinions cited above and a reading of those opinions is assumed herein.

[3] Counsel for *amici* did not submit additional briefing in response to the Remand Ruling.

> the imported article pursuant to 19 U.S.C. 1304, and the retail container of the peanut butter must be marked to indicate its Canadian content. The Customs Service has no objection to the marking also identifying the U.S. content, but that is a matter within the jurisdiction of the [Federal Trade Commission].

Remand Ruling at 9.

Plaintiff maintains that the Remand Ruling is arbitrary, capricious, an abuse of discretion, and not otherwise in accordance with law. Briefly, the thrust of plaintiff's position is that "[u]nrefuted evidence on the administrative record before Customs indicates not only that the imported slurry loses its separate identity by being blended after importation with a far greater quantity of domestic slurry, but also that the combined mass undergoes chemical reactions which work significant and irreversible changes in its physical and chemical structure." Thus, insists plaintiff, "[t]he finished peanut butter has a different name, character and use than the imported slurry used as a minor ingredient in its manufacture." Pltf's Br. at 2–3.

II

FACTS OF RECORD

Customs, as it must, based its Remand Ruling regarding the substantial transformation issue substantially on the facts presented by plaintiff to Customs as part of the administrative record of a preimportation ruling:

> CPC will import shelled peanuts from an unspecified country into Canada where they will be roasted, blanched, split, and ground up in a primary mill into a "gritty paste" also known as a slurry. The slurry will be imported into the United States in tank wagons. You state that the imported slurry will not be commercially suitable for sale as "peanut butter" since it lacks the smooth and creamy character and flavor which consumers typically associate with peanut butter. You also note that the imported slurry has a very short shelf life. Subsequent to importation, the slurry is removed from the tank truck, placed into a holding kettle, and heated to a temperature of approximately 120–150 degrees Fahrenheit. The slurry is then mixed to achieve uniform dispersion of the oils. This is done because the solid materials may separate during transit. At this stage, you describe the slurry as coarse, gritty, oily, and bland.
>
> Next, the slurry is mixed with a ground slurry prepared from shelled United States-origin peanuts which have been roasted, blanched, split, and subjected to a primary grind in the United States. The slurries are then pumped together into a surge kettle and mixed together. According to your estimates, the ratio of Canadian-origin slurry will generally account for between 10 and 40 percent of the entire mixture. The mixed slurry is then sent to an ingredient station.
>
> At this station, additives are injected into the slurry mixture in a trough and the materials are then pumped into a mixing kettle where the slurry is heated to between 150 and 165 degrees Fahrenheit and mixed thoroughly. You state that the added ingredients are

extremely important in determining the final taste and character of the peanut butter. These ingredients include salt, sweeteners (dextrose and sucrose), peanut oil, and stabilizers (a blend of rapseed, cottonseed, and soybean oils) which are designed to react with the slurries to produce chemical changes in the finished product. In certain instances, specialty flavorings may also be added.

The product is then pumped through heat exchangers to cool the mixture down in preparation for milling. The liquid is then pumped through two successive size reduction mills which further break up the peanut particles. Following these grinding operations, the product is no longer gritty, but is of a smooth consistency. The smooth peanut butter mixture is pumped to a vacuum kettle removing the remaining air in the product. Once this degassing is accomplished, the product is cooled to a temperature of 92 degrees Fahrenheit. This cooling triggers the formation of fat crystal structures which gives the product the smooth consistency typical of commercially available peanut butter products. You state that the formation of these fat crystals is the essential characteristic of a peanut butter as compared to a peanut slurry. While the peanut butter is still soft, the peanut butter is pumped into retail jars, sealed, and stored in a warehouse for at least 24 hours to permit further cooling and to allow the product's texture to solidify. After this processing, the product will have a long shelf life (in excess of 12 months).

In addition to the foregoing facts submitted by plaintiff, apparently relying on facts within the realm of common knowledge, Customs observed in its remand ruling that prepackaged peanuts that are roasted, blanched, split and ground into a paste (*viz.*, peanut slurry) are commercially marketed at retail as "old fashioned peanut butter" or "natural peanut butter."

III

STANDARD OF REVIEW

As was the standard of review for the initial HRL, in reviewing Customs' Remand Ruling the focus of the court's inquiry is to determine whether the ruling is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See* 28 U.S.C. §§ 1581(h) and 2640(e); 5 U.S.C. § 706.

IV

DISCUSSION

In accordance with the court's order of remand, Customs addressed the following issue: "Whether the peanut slurry imported from Canada for processing into peanut butter in the United States, through the addition of U.S.-origin slurry as well as salt, sweeteners, and stabilizers, is substantially transformed in the United States resulting in the U.S. processor becoming the ultimate purchaser of the imported slurry pursuant to 19 U.S.C. 1304(a) and 19 CFR 134.35(a)."[4]

[4] Part 134, Customs Regulations (19 C.F.R. Part 134) implements the country of origin marking requirements and exceptions of 19 U.S.C. § 1304.

Customs ruled on remand that *National Juice* presented an analogous situation and applied that analysis to plaintiff's domestic processing. In *National Juice*, foreign and domestic batches of frozen orange juice concentrate were blended into a manufacturing concentrate in certain foreign-domestic ratios, to which was added water, orange essences, orange oil, and in some cases, fresh juice, to produce the finished retail products (frozen concentrated orange juice or reconstituted pasteurized juice). With respect to the *National Juice* retail orange juice products, Customs had ruled that no substantial transformation resulted from such domestic processing. HRL 728557 published as C.S.D. 85–47, 19 Cust. Bull. No. 39 at 21 (Sept. 4, 1985). Citing *United States v. Murray*, 621 F.2d 1163, 1170 (1st Cir. 1980) and *Uniroyal, Inc. v. United States*, 3 CIT 220, 542 F. Supp. 1026 (1982), *aff'd*, 702 F.2d 1022 (Fed. Cir. 1983), and following the traditional *Gibson-Thomsen* substantial transformation criteria of change of name, character or use, the *National Juice* court sustained Customs' ruling holding that a party claiming that processing results in a substantial transformation "must demonstrate that the processing done in the United States substantially increases the value of the product or transforms the import so that it is no longer the essence of the final product."

In its Remand Ruling in the current case, Customs applied the very same "essence" analysis of *National Juice* to CPC's proposed processing of Canadian-origin peanut slurry blended with domestic peanut slurry to which other ingredients were to be added in the domestic processing to enhance flavor, smoothness, shelf life, etc. Hence, in the Remand Ruling Customs concluded:

> Analogously, it is reasonable to conclude that the blending together of peanut slurry of U.S. and Canadian origin along with other minor ingredients does not result in the substantial transformation of these materials. As was the case for the orange juice concentrate and juice products, the essential character of the finished peanut butter is imparted by the peanut slurry which is of both Canadian and domestic origin.

Remand Ruling at 6.

The court finds there is a rational—indeed compelling—basis for Customs' application of the *National Juice* "essence" analysis to CPC's processing of Canadian-origin peanut slurry; therefore, the Remand Ruling is not arbitrary, capricious, an abuse of discretion or otherwise contrary to law, as claimed by plaintiff.

Plaintiff argues that Customs' Remand Ruling arbitrarily disregards the relatively minor value of the *Canadian-origin* slurry in relation to the cost of producing the finished retail product. However, the court notes that under its "essence" analysis, the *National Juice* court rejected plaintiff's claim of substantial transformation of the imported manufacturing concentrate in part because the manufacturing concentrate *blend* constituted the majority of the value of the end products and the evidence failed to establish any substantial increase in value from

the *manufacturing concentrate stage* to the retail product stage resulting from the addition and blending of the orange essences, orange oil, and water with the concentrate and related processing in producing the retail products. Thus, the court observed: "[c]onsidering the process as a whole, the court concludes that Customs could rationally determine that the major part of the end product, when measured by cost, value, or quantity, is manufacturing concentrate [viz., the blend of both foreign and domestic concentrates] and that the processing in the United States is a minor manufacturing process." Id. at 991[5].

As in *National Juice*, the court finds here that the value of the slurry blend, both Canadian and domestic, constitutes the majority of the value of the finished product, and the value of the slurry blend is not substantially increased by the additional ingredients and domestic processing. Moreover, the *National Juice* court focussed on the fact that the essential character of the retail orange juice products was in substantial part imparted by the foreign concentrate, and that the addition of other ingredients to and processing of the *concentrate* to produce the retail products "does not change the fundamental character of the product, it is still essentially the product of the juice or oranges." Thus, the court stated:

> [T]he retail product in this case [frozen concentrate or reconstituted pasteurized juice] is essentially the juice concentrate derived in *substantial part* from foreign grown, harvested and processed oranges. The addition of water, orange essences and oils to the concentrate, while making it suitable for retail sale *does not change the fundamental character of the product*, it is still essentially the product of the juice or oranges.

National Juice, 10 CIT at 61, 628 F. Supp. at 991 (emphasis added).

In *National Juice*, the foreign manufacturing concentrate was commonly blended with domestic concentrate in foreign-domestic ratios of 50/50 or 30/70. Hence, the blended manufacturing concentrate in *National Juice* used to produce the end retail products was derived from at least half to nearly three-fourths domestic concentrate. Here, Canadian-origin slurry blended with domestic-origin slurry would account for at least 10% and as much as 40% of the blend of slurries used in the retail product. Remand Ruling at 3. Moreover, the retail product in this case, CPC's finished peanut butter, is essentially peanut slurry (albeit enhanced in flavor, smoothness and shelf life by the domestic processing), which would be comprised in *substantial part* from the Canadian-origin slurry. The added ingredients to the blend of slurries to enhance

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[5] Plaintiff seems to place heavy emphasis on the fact that Canadian-origin slurry alone would account for a minor portion of all the ingredients used in making finished peanut butter, and in considering the value added by U.S. processing the court should include not only the cost of the additional ingredients and U.S. processing, but also the cost or value of the U.S. peanut slurry blended with the foreign slurry. Pltf's Br. at 16. The court notes, however, that under the *National Juice* essence analysis under which the manufacturing concentrate *blend* (not simply the imported concentrate) imparted the essence to the retail products, the court considered only the value added to the *blend* of foreign and domestic manufacturing concentrates by the addition of other ingredients and U.S. processing of the blend. Thus, the court observed that "the major part of the end product * * * is *manufacturing concentrate* and that the processing in the United States [of the blend] is a minor manufacturing process. The foregoing analysis follows from the *National Juice* court's finding that the manufacturing concentrate blend (*i.e.*, the blend of foreign and domestic concentrates) and not simply the imported concentrate imparts the essential character to the end products.

the taste, smoothness, shelf life, etc., like the addition of water, orange essences and oils to orange juice manufacturing concentrate,[6] do not change the fundamental character of peanut slurry, or indeed change the critical fact that the essential character of the end product is imparted by the slurry.

On the substantial transformation issue of "change of character" of the slurry blend by U.S. processing, counsel for CPC has ably marshalled the facts of record relating to the addition of various ingredients to the blend (flavor enhancers, such as salt, dextrose, sucrose, various oils), "flavor chemistry reactions," enhancement of the shelf life of the slurry, appearance, taste, palatability, and smoothness differences (more creamy and spreadable) and other identifiable physical distinctions between the slurry blend and CPC's finished peanut butter. While defendant seeks to analogize the facts of the current case to the processing of the manufacturing concentrate in *National Juice*, plaintiff attempts to analogize its U.S. processing of peanut slurry to the processing of certain fish in *Koru North America v. United States*, 10 CIT 1120, 701 F. Supp. 229 (1988).

In *Koru*, fish that had undergone initial processing in New Zealand (beheading, detailing, eviscerating and freezing) and were subsequently shipped to South Korea for further processing (thawing, skinning, deboning, trimming to remove jagged edges, fat lines and impurities, glazing to preserve moisture content and enhance shelf life, refreezing to protect the fish from spoiling and finally packaging as frozen fish fillets) were held "substantially transformed" products of South Korea. In holding that the subject fish, which had undergone initial processing in New Zealand, were substantially transformed in South Korea, the court noted the very substantial physical changes resulting from the processing in South Korea—*indeed after processing [in South Korea] the fish no longer possessed even the essential shape of a fish*.

Defendant argues, and the court agrees, that regarding change of character, the South Korean processing of the beheaded and eviscerated fish into trimmed, deskinned, deboned frozen fish fillets would be analogous to a processing of peanuts into slurry, concededly a substantial transformation of the peanuts, but not simply the processing of slurry into finished peanut butter.[7] The latter processing is clearly more analo-

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[6] The foreign manufacturing concentrate import in *National Juice* was a viscous substance with a high brix level (percentage of soluble solids—sugar—in the concentrate, as measured in air at 20 degrees centigrade and adjusted for the acid correction of the solids) of 65 degrees. Because the oils and flavoring ingredients were lost during the initial process of concentrating the juice to approximately fourteen percent of its original volume, imported manufacturing concentrate lacked the characteristic flavor of oranges. By contrast, the end products after U.S. processing—either frozen concentrated orange juice or reconstituted orange juice—resulting from blending the manufacturing concentrate with other ingredients (water, orange essences, orange oil, and in some cases fresh juice) had substantially lower brix levels (the frozen product had a brix level of 41.8 degrees; reconstituted orange juice had a brix level of 11.8 degrees) and more palatable taste chemistries. Moreover, the reconstituted orange juice product was pasteurized chilled, and packed in liquid form. *See National Juice*, 628 F. Supp. at 987. Plainly, then, the imported manufacturing concentrate and the products sold at retail after U.S. processing had vastly different physical characteristics and flavor chemistries; indeed, given the high brix value and loss of oils and flavor ingredients in producing the manufacturing concentrate, the latter, without physically and chemically changing the manufacturing concentrate, could not have been marketed at retail as an acceptable ready to use consumer product. Nonetheless, the *National Juice* court upheld Customs' ruling there was no substantial transformation applying the essential character test. *Id.* at 991.

[7] Customs has ruled that under the change in name, character or use test, a substantial transformation occurs when peanuts are manufactured into peanut butter, HRL 555062 of February 23, 1990.

gous to the processing of the blended foreign-domestic manufacturing concentrates into the retail orange juice products in *National Juice* than to the processing of beheaded and eviscerated fish into frozen fish fillets in *Koru*.[8]

In *National Juice*, there is no specific discussion regarding the taste chemistry involved in the flavor enhancement of the manufacturing concentrates by the addition of orange essences, orange oils, and fresh juice to produce the retail products. Plainly, without the substantial reduction in brix values and flavor enhancement of the manufacturing concentrate blend by domestic processing, the unprocessed manufacturing concentrate blend could not have been offered for sale to the retail purchaser as a palatable ready to use consumer product. Notwithstanding the significant domestic processing required to convert the manufacturing concentrate blends into ready to use consumer products, the *National Juice* court agreed with Customs' ruling there was no substantial transformation of the foreign concentrate since notwithstanding the United States processing, the essential character of the retail products was imparted by the manufacturing concentrate blend.

In the current case, notwithstanding the differences marshalled by plaintiff between peanut slurry and plaintiff's finished retail peanut butter, produced by the addition of various ingredients (salts, sweeteners, peanut oil, and stabilizers), Customs could rationally find that the milling of the peanut slurry, and the heating and cooling, which counsel has indicated affect the taste and consistency of its finished peanut butter, do not change the very essence of the product—"the imported slurry is essentially peanut butter, and used as such, but in a less processed state than the creamy products available under well known trade names." HRL at 6, 8.

Additionally, with respect to whether the essential character of CPC's finished peanut butter is imparted by peanut slurry, Customs observed, and the court may take judicial notice of, the well-known fact that peanut slurry (*i.e.*, prepackaged peanuts that are roasted, blanched, split and ground into a paste) is commercially marketed at retail as "old fashioned peanut butter" or "natural peanut butter."[9] Such peanut butter is also used by the consumer as a spread, albeit a less processed alternative to the more traditional peanut butter product that CPC offers under its Skippy tradename. Customs properly considered, and this court takes judicial notice on the basis of common knowledge that slurry is sold as

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[8] While in its Remand Ruling at 7 Customs alludes to "refinement" of the peanut slurry, the court finds from the administrative record that CPC's U.S. processes "refine" the slurry only in the sense of enhancing the flavor, texture, etc. of the slurry blend, and not in the sense of purification or distillation of slurry. However, Customs' rulings relating to the refinement or purification of crude substances are apposite to the extent they illustrate that under an "essence" analysis, despite the significant physical and chemical changes imparted to a crude product incident to its refinement or purification, Customs has ruled there is no substantial transformation where the essential character of the crude substances were not altered.

[9] As noted by plaintiff, "[t]he administrative record does note that products similar to the imported product are sometimes marketed as "*old fashioned* peanut butter," AR–3, at 9, n.9, and the Remand Ruling states that similar products are sometimes referred to as "*natural* peanut butter." Pltf's Br. at 8 (emphasis in original). However, it is now well settled that a change in name is arguably the weakest evidence of a substantial transformation. *See National Juice Products*, 10 CIT at 48, 628 F. Supp. at 978, citing *Uniroyal, Inc. v. United States*, 3 CIT 220, 542 F. Supp. 1026 (1982), *aff'd* 702 F.2d 1022 (Fed. Cir. 1983) and *United States v. International Paint Co.*, 35 CCPA 87, 93–94, C.A.D. 376 (1948).

"natural" or "old fashioned" peanut butter. As observed by Customs, peanut slurry looks like "peanut butter" (admittedly more gritty than the popular smooth and creamy nationally known brands), and has the "peanutty" taste of CPC's more finished peanut butter product. Remand Ruling at 8.[10] The court does not agree with plaintiff that the flavor and appearance of the peanut slurry is "lost" in the essential character of plaintiff's retail product due to the domestic processing.

CPC argues that the "essential character" rationale applied in *National Juice* and again applied in the Remand Ruling is a "faulty analysis" of Section 304(a), fails to reflect the traditional criteria of the *Gibson-Thomsen* test, and therefore, should now be rejected by this court. Specifically, CPC contends that the "essence" analysis disregards the relatively small volume of imported slurry to be used in producing the finished product and the loss of a separate physical identity of the foreign ingredient.

As previously mentioned, in producing its finished peanut butter CPC would blend the Canadian-origin slurry with domestic slurry in foreign/domestic ratios of between 10% and 40%. Remand Ruling at 3. Plaintiff strenuously contends that at the 10%–40% ratio, coupled with "intimate" commingling of the Canadian and domestic slurries, the Canadian material would lose its separate identity and "becomes an integral part of the new article" within the meaning of *Gibson-Thomsen* indicative of a "change in character." Pltf's Br. at 11. Thus, plaintiff points up that once blended with the U.S. slurry, the Canadian-origin slurry would no longer be physically, chemically or volumetrically distinguishable from the U.S. slurry.

While the blending or commingling of the foreign and domestic slurries obviously obfuscates the separate physical identities of the imported and domestic slurries, such blending and loss of separate identification of the foreign and domestic slurries do not, of course, change the character of either the foreign or domestic slurry, and notwithstanding further processing, the blend of peanut slurries imparts the essential character to plaintiff's finished peanut butter. Accordingly, under the *National Juice* "essence" analysis since the slurry would impart the essential character to the finished product, blending of foreign and domestic ingredients and further processing of the blend would not result in substantial transformation of the foreign product. As noted *supra*, while in *National Juice*, the domestic concentrate comprised fifty or seventy percent of the blended manufacturing concentrate processed in the U.S., the court nonetheless found no substantial transformation for purposes of country of origin marking where the essential character of the retail orange juice products was imparted by the manufacturing concentrate. *See National Juice*, 628 F. Supp. 991, n. 20. Under the "es-

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[10] The administrative record contains no evidence of taste tests or a flavor analysis of either the slurry or finished peanut product. The flavor of *peanut* butter obviously reflects its description as a peanut based product; given the fact that the slurry is nothing more than shelled peanuts, roasted, blanched, split, and ground up into a gritty paste, notwithstanding the absence of evidence of taste tests, Customs' finding that peanut slurry has the appearance of peanut butter and also has a "peanutty" taste is not arbitrary or capricious—indeed cannot seriously be disputed.

sence" rationale of *National Juice*, no substantial transformation of the foreign concentrate resulted despite the loss of a *separate* physical identity of such concentrate in the retail orange juice products.[11] No different conclusion is warranted here where the foreign-domestic ratios in the blends fall into the range of from ten to forty percent.

Coastal States Marketing, Inc. v. United States, 10 CIT 613, 646 F. Supp. 255 (1986), *aff'd*, 818 F.2d 860 (Fed. Cir. 1987), although involving the issue of substantial transformation for purposes of country of exportation determination and therefore not dispositive here, exemplifies the permissible application of the essence rationale to the issue of substantial transformation in the context of blending products allegedly resulting in a new product having a new name, character and use. In *Coastal States Marketing, Inc.*, the court held the process of blending gas oil from the Soviet Union with Italian fuel oil in Italy to make fuel oil did not substantially transform the Russian oil into a product of Italy. The factual basis of plaintiff's argument there was a substantial transformation of the Russian oil was that the mixture of the two oils resulted in producing a fuel oil having qualities distinct from those of the original Russian gas oil. Although the blended oils had a specific gravity, sulphur content, flashpoint, pour point, and viscosity distinct from either the Russian gas oil or the Italian fuel oil comprising the mixture, had a new use (commercial and industrial heating), a new name, and there were other distinctions between the mixture and the individual oils, the court ruled that "[d]espite the differences in the products and the qualification of the Russian oil as a grade different from the blend, the essential character of the Russian component as a fuel oil used primarily for heating remained unchanged." *Id.*, 10 CIT at 617, 646 F. Supp. at 259.

Although in the instant case, in addition to the blending of the Canadian and domestic peanut slurries, there would be additional ingredients and processing of the blend to produce plaintiff's finished peanut butter, following *National Juice* the application of the essence analysis to the finished product remains the same: there is no substantial transformation if, despite the additional ingredients and processing, the slurry imparts the essential character to the finished product.

In sum, plaintiff's contention that the essence rationale as applied in *National Juice* thwarts the application of the traditional "name, character and use" test of *Gibson-Thomsen* is without merit. Rather, the court finds that the essence test is embraced by and aids in applying the tradi-

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[11] In *National Juice*, the foreign manufacturing concentrate was commonly blended with domestic concentrate in ratios of 50/50 or 30/70 (foreign-domestic), the blended concentrate was combined with water, essences, oils, and fresh juice and then frozen or pasteurized. Notwithstanding the foregoing blending and processing, no substantial transformation of the imported concentrate resulted since the manufacturing concentrate (both foreign and domestic) imparted the essential character to the finished retail products. *National Juice*, 628 F. Supp. at 989. The decision of the court that Customs' ruling was not arbitrary, capricious or otherwise contrary to law was expressly limited to concentrates in the ratios presented. *Id.* at 991, n. 20. Of course, no particular substantial transformation analysis applies to all products, and no methodology should be applied to a particular product that leads to absurd results. For example, as the court has recognized, in conducting substantial transformation analyses, it is "difficult to generalize from cases involving combinations of articles to those that involve processing of a single material"; and it is "frequently difficult to take concepts applicable to products such as textiles and apply them to combinations of liquids or fabrication of steel articles." *Superior Wire v. United States*, 11 CIT 608, 615, 669 F. Supp. 472, 479 (1987), *aff'd*, 867 F.2d 1409 (Fed. Cir. 1989).

tional change of name, character or use test. Moreover, in *National Juice* the court expressly cited *Gibson-Thomsen* and pointed out Customs' application of the "name, character or use" test. *National Juice*, 628 F. Supp. at 988, n. 14 and 989. Further, in *Ferrostaal Metals Corp. v. United States*, 11 CIT 470, 664 F. Supp. 535 (1987), the court observed: "In *National Juice Products* * * * the Court specifically applied the criteria of name, character and use in determining that orange juice manufacturing concentrate is not substantially transformed in the process that converts the concentrate into frozen concentrated, or reconstituted, orange juice. Although the Court used the word 'essence' in describing the character of the merchandise, the focus of the court's analysis was the traditional character criterion * * *" *Id.* at 473. *See also National Hand Tool Corp. v. United States*, 16 CIT 308, *aff'd*, 989 F.2d 1201 (Fed. Cir. 1993).

Defendant points up that in its Remand Ruling, Customs also cited to *Coastal States Marketing* as a precedent in noting that "[s]imilarly the classification of peanut slurry is the same classification of the CPC International's finished peanut butter." Remand Ruling at 8. In that connection, Customs Remand Ruling, quoting from *Coastal States Marketing*, 10 CIT at 618, states:

> [A]lthough a change in tariff classification is certainly not controlling, *Rolland Ferres, Inc. v. United States*, 23 CCPA 81, 89, T.D. 47763 (1935), the Court finds that the same classification treatment of the products involved in this case is some indication that the imported blend was not a new and different product. The imported components are each simply variant grades of the *same* product identified as fuel oil, with the resulting blend also identified as fuel oil. (emphasis in original) *Id.* at 618).

Remand Ruling, at 8.

Continuing, Customs concludes:

> Similarly, the classification of peanut slurry is the same classification of the CPC International's finished peanut butter. Pursuant to the CIT's direction in *Coastal States*, Customs also finds that the fact that the slurry and the peanut butter are classified under the same tariff provision supports a finding that the peanut butter is not a new and different product. Similar to the fuel oil in *Coastal States*, we find that the peanut slurry and refined peanut butter can be considered "variant grade of the *same* product," *i.e.*, peanut butter.

Remand Ruling at 8.

Plaintiff further notes that to the extent peanut slurry may sometimes be used as "natural" peanut butter or may be referred to as "old fashioned" peanut butter, the descriptions are indicative of a change in name for slurry, and hence of a substantial transformation. In *National Juice*, plaintiffs argued, and the court rejected, that the name change from "concentrated orange juice for manufacturing" to "frozen concentrated orange juice" and "orange juice from concentrate" was indicative of substantial transformation. The court pointed out that the different

nomenclatures referred to "orange juice" at different stages of production, and in any event "a change in the name of a product is the weakest evidence of a substantial transformation," citing *Uniroyal*, *supra*, and *United States v. International Paint Co.*, 35 CCPA 87, 93–94, C.A.D. 376 (1948). *See also Coastal States Marketing, Inc.*, 10 CIT at 618, 646 F. Supp. at 259 ("It is also not determinative that the Russian No. 2 oil can also be referred to as 'gas oil'.").

Similarly, the court agrees with defendant that for purposes of determining whether CPC's processing would result in substantial transformation, it is not dispositive that "peanut slurry," "natural peanut butter," or "old fashioned peanut butter" are called simply "peanut butter" by plaintiff.

Plaintiff further urges that "although the imported slurry might be capable of use as a natural peanut butter, the evidence of record indicates that it is more commonly used, [and is solely used by plaintiff] as an ingredient for further processing in the manufacture of peanut butter products in the United States." Further, insists plaintiff, the use of finished peanut butter *(i.e.*, simply as a spread) might be narrower and more specialized than the use of the imported ingredient *(i.e.*, as both a spread and as an ingredient for further processing into a more finished peanut butter) is another factor that suggests a substantial transformation has occurred. In connection with the foregoing contentions, plaintiff relies heavily on decisions wherein the courts considered whether substantial transformation resulted from post-importation processing that changed the imported article from a producer good *(i.e.*, one typically used by the producer in further manufacture) to a consumer good *(i.e.*, one typically consumed by an end user). *Midwood Indus. v. United States*, 64 Cust. Ct. 499, 313 F. Supp. 951 (Cust. Ct. 1970), *appeal dismissed*, 57 CCPA 141 (1970) (manufacture of steel forgings into flanges and fittings). *See also Torrington Co. v. United States*, 764 F.2d 1563 (Fed. Cir. 1985) (substantial transformation for purposes of GSP treatment).

The *National Juice* court rejected transformation from a producers' good to a consumers' good as a determinative criterion in marking cases, stating:

> Customs also found that the fact that the imported concentrate is sold to producers whereas the retail product is sold to consumers does not constitute a sufficient change in character and use to render the concentrate substantially transformed. Plaintiffs rely on the *Midwood* decision, in which this court's predecessor, the Customs Court, emphasized this transition from producers' goods to consumers' goods in finding that steel forgings are substantially transformed into flanges and fittings. [citation omitted.] As noted by Customs, however, *the significance of this producers' good-consumers' good transformation in marking cases is diminished in light of this court's recent decision in Uniroyal v. United States, 3 CIT 220, 542 F. Supp. 1026 (1982), aff'd 702 F.2d 1022 (Fed. Cir. 1983).* In *Uniroyal*, the imported article was a leather shoe upper to

> which an outersole was attached in the United States. Although the upper is not a consumers' good in that it cannot be worn as a shoe, the court found that there was no substantial transformation. *Id.* at 227, 542 F. Supp. at 1031. *Under recent precedents, the transition from producers' to consumers' goods is not determinative. Plaintiffs must demonstrate that the processing done in the United States substantially increases the value of the product or transforms the import so that it is no longer the essence of the final product.* [citations omitted.]

Id., 10 CIT at 60, 628 F. Supp. at 989–90 (emphasis added).

Accordingly, in *National Juice* the fact that the imported manufacturing concentrate was used solely as a producers' good whereas after domestic processing into the retail or end user orange juice products, the latter were consumers' goods was not determinative that the processing resulted in a substantial transformation of the manufacturing concentrate. The same result obtains here. Thus, notwithstanding the facts that CPC would use Canadian-origin slurry *solely* as an ingredient in its finished peanut butter and would not sell the slurry as a consumer peanut butter product, are not dispositive where the essential character of the finished product is imparted by the peanut slurry.

Finally, plaintiff insists that Customs' Remand Ruling completely sidesteps the issues of whether, for purposes of country of origin marking under § 1304(a), CPC's Skippy peanut butter is an "article of foreign origin" and whether Customs may lawfully require "ingredient disclosure" of the Canadian slurry in the finished product. The court disagrees.

Fundamentally, a determination of the country of origin for purposes of the marking statute is a mixed question of fact and law. As to the latter aspect of the question, the courts have employed various criteria, the principle of substantial transformation being of paramount application. *See National Juice*, 628 F. Supp. at 988–89, n. 14; *Coastal States Marketing, Inc.*, 10 CIT at 615, 646 F. Supp. at 257. Consequently, the issue as posed by plaintiff of whether its finished peanut butter is an "article of foreign origin" subject to country of origin marking, simply begs the more fundamental question presented to Customs in the remand—and thoroughly briefed by counsel—whether the Canadian-origin slurry would be "substantially transformed" under the *Gibson-Thomsen* test by plaintiff's U.S. processing so that CPC would be the "ultimate purchaser" of the slurry within the purview of the statute. Implicit in Customs' Remand Ruling is that since no substantial transformation of the Canadian-origin slurry results from plaintiff's U.S. processing, the retail consumer rather than CPC would be the ultimate purchaser of the import under the statute. Irrespective of whether the issue in this case is couched in terms of whether the finished peanut butter product assertedly excepted from country of origin marking is an "article of foreign origin" within the purview of § 1304(a), whether plaintiff's United States processing results in "substantial transformation" of the Canadian-origin slurry under the traditional *Gibson-Thomsen* criteria, or whether

plaintiff or the retail consumer of its finished peanut butter is the "ultimate purchaser" of the slurry under the marking statute, the result remains the same: CPC's retail containers of finished peanut butter must bear an appropriate country of origin marking. In the analogous situation in *National Juice*, the court similarly ruled, with reference to substantial transformation, ultimate purchaser, and the marking statute:

> The court concludes that Customs' ruling that manufacturing juice concentrate is not substantially transformed when it is processed into retail orange juice products is not arbitrary or capricious, but is in accordance with applicable law. [Footnote omitted.] The orange juice processors are not the ultimate purchasers of the imported product because consumers are the last purchasers to receive the product in essentially the form in which it was imported. In accordance with 19 U.S.C. § 1304, the retail packaging must bear an appropriate country of origin marking.

V

CONCLUSION

Notwithstanding the U.S. processing of the Canadian-origin slurry described in the record, CPC would not be the "ultimate purchaser" within the contemplation of 19 U.S.C. § 1304(a) because consumers would be the last purchasers to receive the product in essentially the form imported.[12] *National Juice*, while involving the issue of substantial transformation of foreign orange juice concentrate processed into retail orange juice products rather than, as here, the issue of substantial transformation of foreign peanut slurry processed into finished peanut butter, is compellingly analogous. Customs, too, found *National Juice* analogous and under that authority reasonably and properly applied the "essential character" analysis to plaintiff's proposed U.S. processing of Canadian-origin peanut slurry. Accordingly, the court affirms the Remand Ruling and rejects plaintiff's challenge to the Remand Ruling as arbitrary, capricious, or otherwise contrary to law. A declaratory judgment in favor of defendant will be entered to that effect.

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[12] The court's decision to sustain Customs' ruling that notwithstanding CPC's processing to enhance the taste, smoothness and shelf life of the product, and such processing would not result in a "substantial transformation" of the Canadian-origin slurry because the essential character of CPC's Skippy brand peanut butter is imparted by peanut slurry (both imported and domestic-origin), carries no negative connotation whatever regarding either CPC's United States processing or of the quality of the resulting finished peanut butter.

(Slip Op. 97–98)

TOYOTA MOTOR SALES, U.S.A., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND NACCO MATERIALS HANDLING GROUP, INC., INDEPENDENT LIFT TRUCK BUILDERS UNION, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA (AFL-CIO), & UNITED SHOP AND SERVICE EMPLOYEES DEFENDANT-INTERVENORS

Court No. 94–02–00106

(Dated July 15, 1997)

JUDGMENT ORDER

CARMAN, *Chief Judge:* On June 14, 1996, this Court remanded to the Department of Commerce several issues arising from plaintiff's challenge to the administrative review covering the period between June 1, 1989 and May 31, 1990, of an antidumping order on certain internal-combustion, industrial forklift trucks from Japan. *See Toyota Motor Sales, U.S.A., Inc. v. United States*, 930 F. Supp. 636 (CIT 1996). In compliance with this Court's remand order, the Department of Commerce filed its remand results on October 9, 1996. *See Final Results of Redetermination Pursuant to Court Remand: Toyota Motor Sales, U.S.A., Inc. v. United States, Slip Op. 96–95 (June 14, 1996)* (date stamped Oct. 9, 1996) *("Redetermination").*

Observing that plaintiff has submitted comments requesting this Court uphold Commerce's *Redetermination*, and noting that defendant and defendant-intervenor have not filed comments on the *Redetermination*, it is hereby

ORDERED that the Department of Commerce's *Redetermination* is affirmed.

(Slip Op. 97–99)

NACCO MATERIALS HANDLING GROUP, INC., INDEPENDENT LIFT TRUCK BUILDERS UNION, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA (AFL-CIO), AND UNITED SHOP AND SERVICE EMPLOYEES, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TOYOTA MOTOR SALES, U.S.A., INC., DEFENDANT-INTERVENOR

Court No. 94–02–00096

Plaintiffs advance two arguments contending the United States Department of Commerce ("Commerce") erred in calculating the U.S. price of the subject merchandise at issue in *Final Results of Redetermination Pursuant to Court Remand: NACCO Materials Handling Group, Inc. v. United States, Slip Op. 96–99 (June 18, 1996)* (date stamped Oct. 9, 1996) *("Redetermination")*. Plaintiffs assert Commerce improperly merged transactions relating to the sale and financing of the subject merchandise and contend only the transactions relating to the sale of the subject merchandise are relevant in calculating its U.S. price. Additionally, plaintiffs argue the statute does not authorize Commerce to offset credit expenses incurred by Toyota Motor Credit Corporation with credit revenues it received as a result of financing it provided to unrelated forklift truck dealers. Defendant and defendant-intervenor maintain this Court should sustain the *Redetermination*.

Held: This Court finds Commerce's *Redetermination* is supported by substantial evidence on the record and is otherwise in accordance with law. Accordingly, plaintiffs' challenge is rejected, and the *Redetermination* is sustained.

(Dated July 15, 1997)

Collier, Shannon, Rill & Scott (Paul C. Rosenthal, Mary T. Staley, David C. Smith, Jr., and *Craig L. Silliman),* Washington, D.C., for plaintiffs.

Frank W. Hunger, Assistant Attorney General of the United States; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Velta A. Melnbrencis); Terrence J. McCartin,* Office of Chief Counsel for Import Administration, United States Department of Commerce, of Counsel, for defendant.

Dorsey & Whitney (John B. Rehm, Munford Page Hall, II, and *L. Daniel Mullaney),* Washington, D.C., for defendant-intervenor.

OPINION

CARMAN, *Chief Judge:* This matter is before the Court following remand to the United States Department of Commerce ("Commerce"). *See NACCO Materials Handling Group, Inc. v. United States,* 932 F. Supp. 304 (CIT 1996) *("NACCO II")*. In compliance with this Court's order, Commerce filed its remand results on October 9, 1996. *See Final Results of Redetermination Pursuant to Court Remand: NACCO Materials Handling Group, Inc. v. United States, Slip Op. 96–99 (June 18, 1996)* (date stamped Oct. 9, 1996) *("Redetermination")*.

In their comments on the *Redetermination*, plaintiffs continue to dispute Commerce's offsetting Toyota Motor Credit Corporation's ("TMCC") credit expenses with credit revenues it received from unrelated dealers in calculating the U.S. price ("USP") of the subject merchandise. In advancing this challenge, plaintiffs raise two arguments. First, plaintiffs argue Commerce improperly merged transactions relating to the sale and financing of the subject merchandise, and contend

Commerce should have determined the sale and financing constitute two independent legal transactions. Second, plaintiffs argue the statute does not authorize Commerce to offset TMCC's credit expenses with credit revenues TMCC received from unrelated dealers in calculating the subject merchandise's USP. Defendant and defendant-intervenor contend the *Redetermination* is supported by substantial evidence on the record and is otherwise in accordance with law, and therefore should be sustained by this Court.

Based on the reasoning which follows, this Court finds the *Redetermination* is supported by substantial evidence on the record and is otherwise in accordance with law. Accordingly, plaintiffs' challenges are rejected and the *Redetermination* is sustained.

BACKGROUND

This matter involves a challenge to the final results of Commerce's administrative review, covering the period between June 1, 1989 and May 31, 1990, of an antidumping order on certain internal-combustion, industrial forklift trucks from Japan. *See Certain Internal-Combustion Industrial Forklift Trucks From Japan; Final Results of Antidumping Duty Administrative Review*, 59 Fed. Reg. 1,374 (Dep't Comm. 1994) (final results). The focus of the dispute in this matter is Commerce's treatment of credit revenues received by TMCC from its financing of forklift truck sales. TMCC provided financing to, and received credit revenues from, unrelated forklift truck dealers and unrelated end-users which purchased forklift trucks. In making adjustments to the subject merchandise's USP pursuant to 19 U.S.C. § 1677a(e)(2) (1988), Commerce offset TMCC's credit expenses with credit revenues received from unrelated dealers but not credit revenues received from unrelated end-users. Commerce explained that because it based USP on the price Toyota Motor Sales, U.S.A., Inc. ("TMS") charged to unrelated dealers, it considered "revenue generated as a result of the sale by the dealer to the end-user through a financing arrangement a separate transaction, and as such, not directly associated with the sale under review." *Id.* at 1,379.

The Court has remanded this matter to Commerce on two previous occasions. Most recently the Court remanded this matter to Commerce to

> (1) explain whether Commerce has a general practice of consolidating parent companies and subsidiaries in antidumping determinations * * *; (2) explain whether Commerce has been using consolidation only in the calculation of cost of production or constructed value * * *; (3) explain what the "requirements for control" are and how they are met, if they are met, in the present case; (4) explain whether * * * Commerce is required to differentiate long-term loans from other loans for the purpose of excluding interest income on TMCC's long-term loans; (5) point out what evidence on the record supports a finding of control, and any evidence supporting consolidation, in the present case * * *; and (6) if necessary in light of any of Commerce's findings on remand, readdress plain-

> tiffs' argument that the sale and financing of the forklift trucks were separate transactions.

NACCO II, 932 F. Supp. at 314.

In responding to the questions posed in this Court's remand order, the *Redetermination* advances three principal contentions. First, the *Redetermination* takes the position that Commerce's treatment of Toyota Motor Corporation of Japan ("TMC"), TMS and TMCC as a single entity in calculating the subject merchandise's USP is supported by substantial evidence on the record and otherwise in accordance with law. In explaining the rationale for treating TMC, TMS and TMCC as a single entity, the *Redetermination* notes

> [t]he antidumping statute, the Department's regulations, and the Department's practice create what could be termed a general practice of treating related parties as a single entity where there exists a possibility for manipulation of the prices and costs used in the dumping analysis or where such treatment is otherwise necessary in order to calculate accurately such price and costs. The underlying rationale for this practice is the recognition that sales prices between related parties may not reflect arm's-length transactions or related parties may otherwise shift costs, thereby affecting the accuracy of our calculations of USP and foreign market value (FMV).

Redetermination at 4 (footnotes omitted).

Second, the *Redetermination* asserts because TMC, TMS and TMCC all are appropriately considered to be a single entity, the sale and financing of the forklift trucks are viewed properly as a single transaction. The *Redetermination* asserts

> it does not matter whether the financing provided by TMCC is viewed as part of the forklift sales transaction made by TMS or as a separate transaction. When TMS makes a sale to an unrelated dealer (the first unrelated customer) and TMCC finances that same sale to the unrelated dealer, the credit expense is incurred and the credit revenue is earned by the seller, which is Toyota as a single entity.

Id. at 20.

Finally, the *Redetermination* discusses the statutory authority for Commerce's adjustments to the subject merchandise's USP. The *Redetermination* notes pursuant to 19 U.S.C. § 1677a(e)(2) Commerce

> seek[s] to capture both the expense incurred and revenue earned on the sale at issue. * * * We also adjust the [exporter's sales price] for any revenue gained for providing sales services that give rise to the selling expenses. We factor into our analysis all expenses and revenues relating to the sale at issue, regardless of the length of time involved, in order to arrive at a net USP that reflects the costs incurred by the respondent on its U.S. selling activities and captures the full price paid by the customer, as dictated by the law and by our regulations.

Id. at 17 (footnote omitted).

CONTENTIONS OF THE PARTIES

A. *Plaintiffs:*

Plaintiffs' comments on the *Redetermination* continue to challenge Commerce's decision to offset credit expenses incurred by TMCC with credit revenues received from unrelated dealers in calculating the subject merchandise's USP. Plaintiffs contend Commerce's decision to offset TMCC's credit expenses with the credit revenues it received, which increased the subject merchandise's USP, is not supported by substantial evidence on the record and is not in accordance with law.

Specifically, plaintiffs assert Commerce committed two errors in its *Redetermination*. First, plaintiffs contend Commerce erred by "combin[ing] two separate legal transactions into one; it has combined the selling function performed by Toyota Motor Sales, Inc. ("TMS") (related to the sale of a truck) with the lending function performed by TMCC (related to the loan of money)." (Pls.' Resp. to the Commerce Dep't's Final Results of Redeterm. ("Pls.' Comm.") at 2–3.) Plaintiffs allege that as a result of this error

> the Department is not comparing the actual selling price of the product in the United States to the actual selling price of the product in the home market. Rather, Commerce is comparing the cost incurred by a purchaser to borrow money *combined with* the selling price of a forklift truck in the U.S. to the selling price of a forklift truck in the home market.

(Id. at 2.)

Plaintiffs' second challenge asserts Commerce's offsetting TMCC's credit expenses with credit revenues received from unrelated dealers is not permitted by the statute. According to plaintiffs "nothing in the statute authorizes the Department to add the revenue from these transactions to the original selling price of the forklift truck for purposes of calculating the dumping margin." *(Id.* at 6.) As a result of these alleged errors, plaintiffs request this Court once again remand this matter to Commerce "with instructions to the Department to eliminate interest income earned by TMCC from the dumping calculations." *(Id.* at 8.)

B. *Defendant:*

Defendant responds to plaintiffs' argument that Commerce failed to compare the price of the product sold in the United States with the price of the product sold in the home market by asserting plaintiffs' argument is "based upon a wrong premise." (Def.'s Comments to Pls.' Resp. to Comm. Dep't's Final Results of Redeterm. ("Def.'s Comm.") at 3.) According to the defendant, "Commerce did not consider the cost incurred by the purchaser when borrowing the price from TMCC. Rather, Commerce considered the cost incurred, and offset by the revenue earned, by TMCC—part of the Toyota entity—in lending the purchase price to the purchaser." *(Id.* at 3.) Defendant also contends plaintiffs are incorrect in asserting the antidumping statute requires Commerce to compare actual selling prices. According to the defendant, "the law requires Commerce to compare an adjusted USP with FMV. When USP is based upon

[the exporter's sales price], Commerce must reduce the starting price by the selling expenses generally incurred by or for the account of the exporter." *(Id.* at 4 (citing 19 U.S.C. § 1677a(e)(2) (1988); 19 C.F.R. § 353.41(3)(2)).)

Additionally, defendant responds to plaintiffs' argument that Commerce should have treated the sale and financing of forklift trucks as separate transactions. According to the defendant, "it does not matter whether the selling function performed by TMS is viewed as part of, or as legally separate from, the financing function performed by TMCC" because Commerce adjusted the exporter's sales price ("ESP") to account for credit expenses incurred and credit revenue earned "by the Toyota entity, of which TMCC is a part." *(Id.* at 4 (footnote omitted).)

Finally, defendant responds to plaintiffs' argument Commerce should have required Toyota to demonstrate that TMCC's financing of the forklift sale was considered part of the bargain by noting "Commerce properly rejected this * * * argument because it called for a test which was contrary to 19 U.S.C. § 1677a(e)(2) and wholly unworkable." *(Id.* at 5.) Defendant asserts that rather than applying plaintiffs' proposed "price effect" test, "Commerce confirmed * * * TMCC's credit expenses were selling expenses that were directly related to forklift truck sales and properly adjusted ESP consistent with 19 U.S.C. § 1677a(e)(2)." *(Id.* at 5–6.) Defendant also rejects plaintiffs' argument contending Toyota should be required to prove the forklift truck sale was dependent upon a loan from TMCC as contrary to the requirement of 19 U.S.C. § 1677a(e)(2) which "require[s] Commerce, in calculating ESP, to deduct all expenses generally incurred by or for the account of the "exporter" in the United States in selling the forklift trucks." *(Id.* at 6.) According to defendant, "NACCO's test would permit a deduction of only those selling expenses that are a precondition to the consummation of any sale or of a sale at a particular price. The statute, however, places no such limitation upon the allowable selling expenses." *(Id.* at 7.)

C. *Defendant-Intervenor:*

The comments filed by defendant-intervenor urge this Court to affirm Commerce's *Redetermination* and to order Commerce to direct the liquidation of the entries covered by the administrative review at issue. While defendant-intervenor previously contested Commerce's treatment of the Operator Restraint Safety ("ORS") seat expenses, defendant-intervenor's comments on the *Redetermination* note "[t]his case has been extensively briefed and argued by the parties over the past two-and-a-half years, and, in that time, the Department has reconsidered and elaborated on its final decision in the administrative review under consideration in the course of two separate remands. It is now time for closure." (Def.-Interv.'s Comments on Def.'s Final Results of Redeterm. ("Def.-Interv.'s Comm.") at 1–2.)

STANDARD OF REVIEW

In reviewing a remand determination by the United States Department of Commerce, this Court must sustain the remand determination

unless it is determined to be "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

DISCUSSION

1. *Commerce's Treatment of TMC, TMS and TMCC as a Single Entity in Calculating the USP of the Subject Merchandise:*

The first issue addressed in the *Redetermination* is Commerce's practice of treating related parties as a single entity in calculating the USP of subject merchandise in antidumping duty investigations. The *Redetermination* notes the statute requires Commerce to treat the exporter and the U.S. importer as a single entity where "the exporter directly or indirectly owns an interest in the U.S. importer." *Redetermination* at 6 (footnote omitted) *(citing* 19 U.S.C. § 1677(13)(c) (1988) (providing the statutory term "exporter" includes individuals who import or for whose account goods are imported into the United States if "the exporter, manufacturer, or producer owns or controls, directly or indirectly, * * * any interest in any business conducted by such person"). Commerce asserts its treatment of related parties as a single entity is necessary to prevent "respondents [from] avoid[ing] our inclusion of certain U.S. expenses in the dumping analysis by shifting selling expenses from the U.S. importer to related companies." *Id.* at 7.

In applying the statute, Commerce determined TMC, TMS and TMCC all fall within the definition of "exporter" in 19 U.S.C. § 1677(13) (1988), and thus are appropriately treated as a single entity in calculating the subject merchandise's USP. Commerce concluded TMC was appropriately included in the statutory definition of the "exporter" because "it is the company that exported the subject merchandise to the United States." *Id.* at 8. Additionally, Commerce determined TMS and TMCC also fell within the statutory definition of "exporter" because "TMS is the U.S. importer of record" and TMCC is "its wholly owned subsidiary." *Id.* The *Redetermination* also emphasizes both TMS and TMCC satisfy the ownership requirements of 19 U.S.C. § 1677(13)(c) (1988), and thus are properly treated as part of a single entity, because "TMC directly owns 100 percent of TMS and indirectly owns, through TMS, 100 percent of TMCC." *Id.*

The Court notes plaintiffs' comments do not challenge Commerce's determination to treat TMC, TMS and TMCC as a single entity. In addition to the inter-related ownership structure discussed in the *Redetermination*, the Court finds Toyota's questionnaire responses provide additional evidence supporting Commerce's treatment of TMC, TMS and TMCC as a single entity. Specifically, Toyota's questionnaire responses indicate similarities in the management structure and composition of the boards of directors as well as common stock ownership among

TMC, TMS and TMCC. Accordingly, the Court finds Commerce's treatment of TMC, TMS and TMCC as a single entity constituting the "exporter" of the subject merchandise, pursuant to 19 U.S.C. § 1677(13)(c) (1988), is supported by substantial evidence on the record and is otherwise in accordance with law.

The Court's finding that Commerce's treatment of TMC, TMS and TMCC as a single entity is supported by substantial evidence on the record and otherwise in accordance with law neutralizes the strength of plaintiffs' argument that Commerce improperly merged transactions involving the sale and financing of the subject merchandise. Plaintiffs argument that Commerce, by including credit revenues received by TMCC in calculating the subject merchandise's USP, is "comparing the cost incurred by a purchaser to borrow money combined with the selling price of a forklift truck in the U.S. to the selling price of a forklift truck in the home market" (Pls.' Comm. at 2) relies upon an artificial distinction. TMC, TMS and TMCC constitute a single entity which received both the selling price of the subject merchandise as well as credit revenue resulting from the provision of financing to unrelated dealers. Rather than constituting two separate arm's length transactions, the sale and financing of the subject merchandise are viewed properly as two transactions carried out by different branches of the same entity. Indeed, plaintiffs' comments on the *Redetermination* acknowledge the sale and financing transactions "each * * * earn[s] revenue for the larger corporate entity Toyota." *(Id.* at 3.) Accordingly, plaintiffs' arguments the sale and financing transactions are separate legal transactions and that only the transactions involving the sale of the subject merchandise are relevant to the calculation of the USP are rejected.

2. *Commerce's Inclusion of Credit Revenues Earned by TMCC in Calculating USP:*

Before addressing the merits of plaintiffs' second argument, the Court would like to clarify plaintiffs' characterization of Commerce's calculation of the subject merchandise's USP. Plaintiffs assert "the Department [im]properly allowed Toyota Motor Corporation ("Toyota") to increase its U.S. price to account for credit revenue earned by a related financial institution." (Pls.' Comm. at 1.) The Court observes, however, the statute specifically provides

> For purposes of this section, the exporter's sales price shall also be adjusted *by being reduced* by the amount, if any, of—
>
> * * * * * * *
>
> (2) expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise.

19 U.S.C. § 1677a(e) (1988) (emphasis added). Because the statute only enumerates circumstances which permit the reduction of the exporter's sales price ("ESP"), plaintiffs' assertion that Commerce's inclusion of credit revenues received by TMCC resulted in "the Department * * * increas[ing] [the] U.S. price" (Pls.' Comm. at 7) could be interpreted incor-

rectly. The Court believes a more accurate characterization would be Commerce's offsetting TMCC's credit expenses with its credit revenues resulted in a smaller reduction in the USP of the subject merchandise than if Commerce did not include the credit revenues. Commerce's methodology did not, as plaintiffs' comments might be read to suggest, result in an overall increase in the USP of the subject merchandise.

Plaintiffs second argument challenging the *Redetermination* asserts Commerce violated the statute by improperly offsetting credit expenses incurred by TMCC with credit revenues received from unrelated dealers. The *Redetermination* cites Section 772(e) of the Tariff Act of 1930 in support of Commerce's practice of offsetting credit expenses with credit revenues. The statute provides that when ESP is used as the measure of the USP, the ESP may be reduced to account for "expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise." 19 U.S.C. § 1677a(e)(2) (1988). According to the *Redetermination*, Commerce acted in compliance with the statute's requirements by "adjust[ing] USP to include the selling expenses incurred and revenue gained by TMCC in providing financing to the unrelated U.S. purchaser of forklift trucks from TMS." *Redetermination* at 10.

The question left for the Court is whether 19 U.S.C. § 1677a(e)(2) permits Commerce to offset credit expenses with credit revenues in making adjustments to the ESP. The statutory language at issue originated in the Antidumping Act of 1921. *See* Antidumping Act of 1921, Pub. L. No. 67–10, § 204(3), 42 Stat. 9, 13 (1921) (providing the exporter's sales price shall be reduced by "an amount equal to the expenses, if any, generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise"). This language was later modified slightly with the passage of the Trade Agreements Act of 1979. *See* Trade Agreements Act of 1979, Pub. L. No. 96–39, § 101, 93 Stat. 144, 181–82 (1979) (codified at 19 U.S.C. § 1677a(e)(2) (1988)).

This Court applies the two step analytical framework established by the United States Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984) in reviewing Commerce's interpretation of the statutory language. First, this Court must determine whether Congress clearly expressed its intent with respect to whether the administering authority may offset credit expenses with credit revenues in making adjustments to the exporter's sales price. *See Chevron*, 467 U.S. at 842, 104 S.Ct. at 2781. If Congressional intent is clear, this Court must give it effect. *See id.* at 842–43, 104 S.Ct. at 2781. However, if Congressional intent with respect to permissible adjustments to the exporter's sales price is unclear, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S.Ct. at 2782 (footnote omitted).

In reviewing the statutory language and legislative history of § 204(3) of the Antidumping Act of 1921, as well as § 101 of the Trade Agreements Act of 1979, the Court is unable to find any expression of Congressional intent as to whether Commerce, in making adjustments to the subject merchandise's ESP, may offset credit expenses with credit revenues generated in the course of extending financing to customers. Therefore, this Court must determine whether Commerce's practice of offsetting credit expenses with credit revenues in calculating ESP is a reasonable construction of the statute. In reaching its determination, the Court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron*, 467 U.S. at 844, 104 S.Ct. at 2782 (footnote omitted).

The parties' opposing positions reflect, in effect, two different interpretations of the phrase "expenses generally incurred" in 19 U.S.C. § 1677a(e)(2). In arguing the statute does not permit Commerce to offset credit expenses with credit revenues, plaintiffs are in effect arguing the phrase "expenses generally incurred" only encompasses expenses incurred by the respondent, irrespective of any offsetting revenue. Therefore, plaintiffs would appear to be arguing for an interpretation which permits Commerce to increase ESP to account for any expenses incurred by the respondent or its related parties, but would not permit Commerce to offset any of those expenses with corresponding revenues.

In contrast, defendant asserts, in effect, the phrase "expenses generally incurred" should be interpreted to include expenses net of any revenues received, or in other words expenses offset by corresponding revenues. In the *Redetermination*, Commerce asserts, "we routinely include both revenues and expenses in our analysis in order to capture fully all adjustments that we must make in order to prevent the manipulation of the dumping law and to calculate the dumping margin as accurately as possible." *Redetermination* at 25.

The Court holds Commerce's construction of the statute to permit the offset of credit expenses with credit revenues is a reasonable construction of the statute, and finds Commerce's construction of the statute will, as the *Redetermination* asserts, promote a more accurate measurement of the dumping margin. Accordingly, the Court rejects plaintiffs' challenge and holds Commerce's adjusting the ESP of the subject merchandise to account for TMCC's credit expenses, net of its credit revenues, is supported by substantial evidence on the record and is otherwise in accordance with law.

3. *Commerce's Treatment of ORS as a Warranty Expense:*

The Court notes defendant-intervenor submitted comments on the draft *Redetermination* to Commerce challenging the treatment of expenses incurred by Toyota in retrofitting certain forklift trucks with Operator Restraint Safety ("ORS") seats as a warranty expense during the period of review ("POR"). In its comments on the *Redetermination* submitted to this Court, however, defendant-intervenor does not raise a similar objection. Indeed, defendant-intervenor's comments urge this

Court to sustain the *Reaetermination*, noting "[t]his case has been extensively briefed and argued by the parties over the past two-and-a-half years, and, in that time, the Department has reconsidered and elaborated on its final decision in the administrative review under consideration in the course of two separate remands. It is now time for closure." (Def.-Interv.'s Comm at 1–2.) The Court, noting no party has challenged Commerce's treatment of the ORS seat retrofit expenses as a warranty expense incurred by Toyota during the POR, finds the *Redetermination*'s treatment of ORS seat expenses is supported by substantial evidence on the record and otherwise in accordance with law.

CONCLUSION

This Court, having found Commerce's *Redetermination* to be supported by substantial evidence on the record and otherwise in accordance with law, rejects plaintiffs' challenges to and sustains the *Redetermination*.

(Slip Op. 97–100)

WHEATLAND TUBE CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND DONGBU STEEL CO., LTD., ET AL., DEFENDANT-INTERVENORS

Court No. 96–04–01078

[Plaintiff's motion for judgment on the agency record is denied.]

(Dated July 18, 1997)

Schagrin Associates (Roger B. Schagrin) for plaintiff.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Velta A. Melnbrencis), Carlos A. Garcia*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Morrison & Foerster, LLP (Donald B. Cameron, Julie C. Mendoza, Craig A. Lewis and *Panagiotis C. Bayz)* for defendant-intervenors.

OPINION

RESTANI, *Judge:* This matter is before the court on a motion for judgment on the agency record by plaintiff Wheatland Tube Company ("Wheatland"). Wheatland seeks a remand to the United States Department of Commerce ("Commerce") with instructions to (1) perform an anticircumvention analysis or provide legally sufficient reasons for failing to perform such an analysis, (2) determine that the scope of the standard pipe orders as evaluated under 19 C.F.R. § 353.29(i)(1) is not dispositively resolved with respect to the pipe at issue, and (3) conduct a scope inquiry pursuant to 19 C.F.R. § 353.29(i)(2). Defendant United States ("the government") argues that the case should be remanded be-

cause, as a matter of law, Commerce is not precluded from issuing an anticircumvention order in this proceeding and Commerce did not provide sufficient reasons for not performing an anticircumvention investigation. At this juncture, the government does not intend to deny the request for an investigation with further reasons stated. Commerce intends to conduct the inquiry. Defendant-intervenors Dongbu Steel Co., Ltd., *et al.* (collectively "the Korean Producers") oppose the government's request for a remand because they claim under the facts of this case an anticircumvention investigation for the alleged "minor alteration" is precluded by statute. The government and defendant-intervenors maintain that the scope determination under 19 C.F.R. § 353.29(i)(1) is supported by substantial evidence.

BACKGROUND

On September 24, 1991, Wheatland and other domestic pipe producers filed antidumping duty petitions covering circular welded non-alloy steel pipe ("standard pipe") from Brazil, Korea, Mexico, Romania, Taiwan, and Venezuela. The scope of the antidumping investigations was similar in each petition. The petition covering products from Brazil, for example, listed the scope of the investigations as follows:

> D. *Description of the Merchandise (19 C.F.R. § 353.12(b)(3))*
>
> The merchandise that is the subject of this petition is welded non-alloy steel pipes, of circular cross-section, not more than 406.4mm (16 inches) in outside diameter, regardless of wall thickness, surface finish (black, galvanized or painted), or end finish (plain end, bevelled end, threaded, or threaded and coupled). These pipes and tubes are generally known as standard pipe, though they may also be called structural or mechanical tubing in certain applications. A more detailed description is provided below.
>
> 1. *Specifications, Characteristics and Uses*
>
> Standard pipes and tubes are intended for the low pressure conveyance of water, steam, natural gas, air and other liquids and gases in plumbing and heating systems, air conditioning units, automatic sprinkler systems, and other related uses. Standard pipe may carry liquids at elevated temperatures but may not be subject to the application of external heat. It may also be used for light load-bearing and mechanical applications, such as for fence tubing.
>
> Standard pipes used in the United States are most commonly produced to the American Society for Testing and Materials (ASTM) standard A–53, although they may also be produced to the ASTM A–135 standard. Some imported standard pipe is also produced to the ASTM A–120 standard, a now defunct specification that was nearly identical to the A–53 standard. Products like fence tubing are often produced to proprietary specifications rather than to an industry standard. * * *
>
> Standard pipe made to DIN and ASTM specifications may be sold with a plain or threaded end, with or without a coupling. It may also be sold with a "black" or "galvanized" surface. Black standard pipe is frequently coated with an oil or lacquer finish to inhibit corro-

sion, and it may also be painted. Galvanized standard pipe is coated with a protective layer of zinc to prevent corrosion.

See Antidumping Duty Petition for Circular Welded Non-Alloy Steel Pipe from Brazil; Def.'s Ex. 1, at 4–5. On October 21, 1991, Commerce initiated antidumping duty investigations covering standard pipe from the countries named in the petition. *See Circular Welded Non-Alloy Steel Pipe from Brazil, the Republic of Korea, Mexico, Romania, Taiwan, and Venezuela,* 56 Fed. Reg. 52,528 (Dep't Comm. 1991) (initiation of antidumping duty investigations). The notice of the initiation described the scope of the investigations as follows:

> The merchandise subject to these investigations is circular welded non-alloy steel pipes and tubes, of circular cross-section, not more than 406.4mm (16 inches) in outside diameter, regardless of wall thickness, surface finish (black, galvanized, or painted), or end finish (plain end, bevelled end, threaded or threaded and coupled). These pipes and tubes are generally known as standard pipe, though they may also be called structural or mechanical tubing in certain applications. Standard pipes and tubes are intended for the low pressure conveyance of water, steam, natural gas, air, and other liquids and gases in plumbing and heating systems, air conditioning units, automatic sprinkler systems, and other related uses. Standard pipe may also be used for light load-bearing and mechanical applications, such as for fence tubing.
>
> Imports of these products are currently classifiable under the following Harmonized Tariff Schedule (HTS) subheadings: 7306.30.10 and 7306.30.50. Although the HTS subheadings are provided for convenience and customs purposes, our written description of the scope of these investigations is dispositive.

Id. at 52,529.

During the investigations, respondents requested clarification of the scope of the investigation regarding "triple-certified" standard pipe. Memorandum from Case Analyst to File (Nov. 15, 1991); Def.'s Ex. 3, at 2. By letter dated November 19, 1991, petitioners responded to Commerce's request for their position as to whether pipes that are produced to both ASTM A–53 standard pipe specification and to API 5L or other line pipe specifications should be included within the scope of investigations. The letter stated that, "[d]ual or triple certified standard pipe should be covered by these investigations only if they enter the United States under one of the tariff numbers listed in section I.D.3 of the petitions." Letter from Luberda to Commerce (Nov. 19, 1991); Def.'s Ex. 4, at 1.

By letter dated March 5, 1992, petitioners answered respondent's requests for clarification of the scope of the investigations with respect to certain structural tubing, mechanical tubing, and standard pipe products. The letter stated,

> *The scope*, as defined by the petition, the Department and the Commission, *clearly excludes* both *imports of line pipe* entering the United States in Harmonized Tariff System of the United States

> (HS) category 7306.10 and oil country tubular goods entering the United States in HS category 7306.20. The scope also clearly excludes boiler tubing entering in category 7306.30.5010 and cold-drawn or cold-rolled mechanical tubing that enters in category 7306.30.5015 or 7306.30.5020. Tube and pipe hollows for redrawing that enter the United States in HS category 7306.30.5035 are also specifically excluded.
>
> However, the scope covers all other pipe that (1) has the physical characteristics described in the petition and in the Department's and the Commission's scope notices, and (2) enters the United States in HS items 7306.30.1000, 7306.30.5025, 7306.30.5032, 7306.30.5040, 7306.30.5055, 7306.30.8525, or 7306.30.5090. Such pipe is within the scope of the investigation regardless of whether it may be referred to as standard pipe, mechanical tubing or structural tubing in various applications.

Letter from Schagrin to Commerce (Mar. 5, 1992) (emphasis added); Def.'s Ex. 5, at 2–3.

In April 1992, Commerce made its preliminary determinations in the investigations. *See, e.g.*, *Circular Welded Non-Alloy Steel Pipe from Brazil*, 57 Fed. Reg. 17,883 (Dep't Comm. 1992) (prelim. det.), and *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea*, 57 Fed. Reg. 17,885 (Dep't Comm. 1992) (prelim. det.). In September 1992, Commerce issued its final determinations. *See, e.g.*, *Circular Welded Non-Alloy Steel Pipe from Brazil*, 57 Fed. Reg. 42,940 (Dep't Comm. 1992) (final det. of LTFV sales), and *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea*, 57 Fed. Reg. 42,942 (Dep't Comm. 1992) (final det. of LTFV sales). The final determinations described the scope of the investigations follows:

> The merchandise subject to this investigation is circular welded non-alloy steel pipes and tubes, of circular cross-section, not more than 406.4mm (16 inches) in outside diameter, regardless of wall thickness, surface finish (black, galvanized, or painted), or end finish (plain end, bevelled end, threaded, or threaded and coupled). These pipes and tubes are generally known as standard pipe, though they may also be called structural or mechanical tubing in certain applications. Standard pipes and tubes are intended for the low pressure conveyance of water, steam, natural gas, air, and other liquids and gases in plumbing and heating systems, air conditioning units, automatic sprinkler systems, and other related uses. Standard pipe may also be used for light load-bearing and mechanical applications, such as for fence tubing, and for protection of electrical wiring, such as conduit shells.
>
> The scope is not limited to standard pipe and fence tubing, or those types of mechanical structural pipe that are used in standard pipe applications. All carbon steel pipes and tubes within the physical description outlined above are included within the scope of this investigation, *except line pipe*, oil country tubular goods, boiler tubing, cold-drawn or cold-rolled mechanical tubing, pipe and tube hollows for redraws, finished scaffolding, and finished rigid conduit. *Standard pipe that is dual or triple certified/stenciled that enters the*

> *U.S. as line pipe of a kind used for oil or gas pipelines is also not included in this investigation.*
>
> Imports of these products are currently classifiable under the following Harmonized Tariff Schedule (HTS) subheadings: 7306.30.10.00, 7306.30.50.25, 7306.30.50.32, 7306.30.50.40, 7306.30.50.55, 7306.30.50.85, and 7306.30.50.90. Although the HTS subheadings are provided for convenience and customs purposes, our written description of the scope of this proceeding is dispositive.

See, e.g., 57 Fed. Reg. at 42,941 (emphasis added).

On October 26, 1992, the United States International Trade Commission ("ITC") notified Commerce of its determination that imports of circular welded non-alloy steel pipe, except mechanical tubing and finished conduit, from Brazil, Korea, Mexico, and Venezuela were materially injuring a United States industry. Consequently, Commerce published antidumping duty orders. *See Certain Circular Welded Non-alloy Steel Pipe from Brazil, the Republic of Korea (Korea), Mexico and Venezuela*, 57 Fed. Reg. 49,453 (Dep't Comm. 1992) (notice of antidumping duty orders) [hereinafter "standard pipe orders"]. The notice described the scope of the orders in a manner similar to the description in the final determination of LTFV sales. *See id.*

On April 23, 1993, Wheatland and other domestic producers filed petitions with Commerce claiming that exports from Korea, Mexico, and Brazil of API 5L line pipe and dual certified pipe were circumventing the antidumping duty orders on standard pipe. Anticircumvention Petition; Pl.'s App., Tab 3. The alleged circumvention consisted of certifying API–5L A or B pipe, a more expensive product to produce, also as ASTM A–53–A and A–53–B standard pipe. *See id.* at 2–3 & n.7. On June 7, 1993, Commerce informed interested parties that it had "determined that a scope inquiry pursuant to 19 C.F.R. § 353.29(i) is the appropriate action to respond to the issues raised by petitioners." Letter to Interested Parties from Lucksinger (Jul. 7, 1993); Pl.'s App., Tab 4, at 1.

In their comments on Commerce's scope inquiry, dated July 7, 1993, petitioners contended that "[t]he written scope description published in the antidumping duty order supports" the conclusion that line pipe and dual-certified pipe, "when intended for use as standard pipe or when actually used as standard pipe, is included within the scope of the antidumping duty order" covering standard pipe. Comments on Scope Inquiry; Pl.'s App., Tab 11, at 1. Petitioners claim that they did not concede that line pipe and dual certified pipe used as, or intended for use as, standard pipe was outside the scope of the antidumping duty order and assert that their decision to file an anticircumvention petition rather than a scope clarification request was based on "the belief that an anticircumvention petition offered a more comprehensive approach to the same problem." *Id.* at 1 n.1. Petitioners, however, did not then question Commerce's decision to conduct a scope rather than an anticircumvention inquiry.

In January 1994, Commerce published its preliminary scope determination. *See Certain Circular Welded Non-Alloy Steel Pipe from Brazil, the Republic of Korea, Mexico and Venezuela*, 59 Fed. Reg. 1929 (Dep't Comm. 1994) (prelim. affirm. scope det.). In the background section of this determination, Commerce noted that the petitioners in the original LTFV investigations had filed anticircumvention petitions with Commerce contending that, pursuant to section 781(c) of the Tariff Act of 1930, as amended [19 U.S.C. § 1677j(c)], and 19 C.F.R. § 353.29(g) (1992), exports from Korea, Mexico, and Brazil of API 5L line pipe and dual-certified pipe were circumventing the antidumping duty orders on standard pipe when they were actually used in standard pipe applications. *Id.* at 1930. Commerce stated that it had determined that a scope inquiry pursuant to 19 C.F.R. § 353.29(i) was the appropriate approach to address the issues raised by petitioners. *Id.* Following a *Diversified Prods.* analysis, Commerce concluded that the language of the scope descriptions in the orders "does not clearly include or exclude line pipe or dual-certified pipe falling within the scope of the orders which is actually used in standard pipe applications." *Id.* at 1931. Commerce preliminarily determined that:

> When API 5L pipe and dual-certified pipe are used in a standard pipe application and fall within the physical parameters outlined in the scope of the orders, they are the same class or kind of merchandise as standard pipe and are therefore included within the scope of the orders on circular welded non-alloy steel pipe from Mexico, Korea, Brazil, and Venezuela.

Id. at 1933 (citations omitted). Petitioners filed comments on Commerce's preliminary scope determination, but again did not challenge Commerce's decision to conduct a scope inquiry pursuant to 19 C.F.R. § 353.29(i) rather than an anticircumvention inquiry pursuant to 19 U.S.C. § 1677j(c) and 19 C.F.R. § 353.29(g). *See* Petitioners' Comments of Prelim. Affirm. Scope Det., Def.'s Ex. 13.

In March 1996, Commerce issued a final negative scope determination. *See Certain Circular Welded Non-Alloy Steel Pipe from Brazil, the Republic of Korea, Mexico and Venezuela*, 61 Fed. Reg. 11,608 (Dep't Comm. 1996) (final neg. scope det.) [hereinafter *"Final Scope Det."*]. Commerce concluded that the scope language adopted in the standard pipe orders "excludes line pipe and dual-certified pipe." *Id.* at 11,609.

Subsequently, Wheatland filed this action contesting Commerce's final scope determination. Wheatland challenges Commerce's determination that line pipe and dual-certified pipe are not within the scope of the standard pipe orders as well as Commerce's failure to conduct an anticircumvention investigation pursuant to 19 U.S.C. § 1677j(c) and to provide a reasoned explanation for its decision not to conduct such an investigation. Thereafter, the government requested a remand with regard to counts three, four, and five of Wheatland's complaint so Commerce could reconsider Wheatland's anticircumvention petition and either file a reasoned explanation for the decision not initiate an anticir-

cumvention investigation or initiate such an investigation. By an order dated October 9, 1996, the court denied the request, noting that Commerce had set forth its reason, that no objection was made to treating the request as one for a scope determination, and that it would be a waste of time and improper to order a remand until error has been demonstrated.

On April 8, 1997, the court ordered Commerce to "supplement its brief with an explanation of the meaning of 19 U.S.C. § 1677j(c)(1) & (2) as they relate to this case. Commerce shall also address any other legal issues which would preclude or allow an anticircumvention finding for the alleged 'minor alteration.'" *Wheatland Tube Co. v. United States*, No. 96–04–01078 (Apr. 8, 1997) (order). The government responded with a supplemental memorandum stating that in Commerce's view,

> a remand in this case would not be futile because, as a matter of law, the Department would not be precluded from issuing an anticircumvention order in this proceeding. In the Department's view, the statute would permit it to consider the allegedly altered merchandise to be within the scope of the outstanding antidumping duty order, notwithstanding the fact that the Department has determined that the merchandise is not within the class or kind of merchandise defined by the antidumping duty order. The subjecting of altered merchandise to coverage under the antidumping duty order is governed by the conditions explicitly set forth in the statute—that the alteration be "minor" and that Commerce not determine that inclusion of the altered merchandise within the scope of the order would be "unnecessary."

Def.'s Supplemental Mem. at 2.

Standard of Review

This court "shall hold unlawful any determination, finding, or conclusion found * * * to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1994); *Koyo Seiko Co., Ltd. v. United States*, 20 F.3d 1160, 1164 (Fed. Cir. 1994).

Discussion

I. *Final Negative Scope Determination:*

Wheatland contends that Commerce erred in determining that the scope of the standard pipe orders, as evaluated under 19 C.F.R. § 353.29(i)(1), is dispositively resolved with respect to the pipe at issue. Wheatland maintains that Commerce should have conducted a scope inquiry pursuant to 19 C.F.R. § 353.29(i)(2) and evaluated line pipe and dual-certified pipe under the *Diversified Prods.* criteria of that regulation.[1] The government and the Korean Producers counter that substantial evidence supports Commerce's final scope determination.

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[1] The criteria set forth in *Diversified Prods. Corp. v. United States*, 6 CIT 155, 162, 572 F. Supp. 883, 889 (1983), and now found at 19 C.F.R. § 353.29(i)(2) are as follows: (1) the general physical characteristics of the merchandise, (2) the expectations of the ultimate purchasers, (3) the ultimate use of the merchandise, (4) the channels of trade in which the merchandise moves, and (5) cost.

Commerce has the inherent authority to define the scope of an investigation. *See Koyo Seiko Co., Ltd. v. United States*, 17 CIT 1076, 1078, 834 F. Supp. 1401, 1403 (1993). This authority is codified in Commerce regulations. 19 C.F.R. § 353.29(i) (1996).[2] Under this regulation, the starting point for determining whether merchandise is within the "class or kind" of merchandise described in an antidumping order is to examine the descriptions of the merchandise in the petition, the initial investigation, and the determinations of the Secretary and the Commission to determine whether such descriptions are dispositive of the matter. *Id.* § 353.29(i)(1). If Commerce determines that the matter is not dispositively resolved, an analysis under the *Diversified Prods.* factors is conducted. *Id.* § 353.29(i)(2).

In the present case, Commerce first considered the language of the petitions and noted that the petitions (1) defined the subject merchandise as welded non-alloy pipes with certain physical criteria, (2) stated that the pipes and tubes in question were generally known as standard pipe, though they might also be called structural or mechanical tubing in certain applications, and (3) provided an illustrative list of typical uses for standard pipe and observed that the merchandise was most commonly produced to the ASTM A–53 specification for standard pipe. *Final Scope Det.*, 61 Fed. Reg. at 11,609. Commerce noted that the petitions did not mention either line pipe or dual-certified pipe. *Id.*

Furthermore, Commerce remarked that in the notice of initiation, it had adopted petitioners' language to define the merchandise covered by the investigations, which also did not mention either line pipe or dual-certified pipe. *Id.* Commerce also noted that neither the petitions nor the initiation notice indicated that actual end use was a consideration in designating the scope of the investigations. *Id.* at 11,610. Based on the petitions and the notice of initiation, Commerce concluded that physical characteristics, not actual end uses, defined scope and neither document addressed, and therefore neither definitely resolved, the treatment of line pipe or dual-certified pipe. *Id.*

Commerce next noted that the record reflects "some initial uncertainty at least as to whether multiple-stenciled pipe" was included in its investigations. *Id.* Commerce emphasized that in a letter dated November 19, 1991, petitioners acknowledged that importers could sell dual-certified pipe entered under the HTS line pipe item into either the line pipe or standard pipe market after it entered the United States. *Id.* at 11,610 & n.4 (this knowledge was reiterated in the anticircumvention petitions). In their letter, however, petitioners stated that "[d]ual or triple certified standard pipe should be covered by these investigations only if they enter the United States under one of the tariff numbers listed in section I.D.3 of the petitions." *See* Letter from Luberda to Commerce (Nov. 19, 1991); Pl.'s App., Tab 13, at 1. Commerce also found the peti-

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[2] In Commerce's most recent proposed regulations, such scope inquiries would be conducted under identical procedures set forth in section 351.225(k), and inquiries under 19 U.S.C. § 1677j(c) would be conducted under section 351.225(i). 61 Fed. Reg. 7308, 7374–76 (Dep't Comm. 1996).

tioners' intention to exclude any pipe entered as line pipe was further evidenced in a letter dated March 5, 1992, in which petitioners stated that "[t]he scope, as defined by the petition, the Department and the Commission, clearly excludes both imports of line pipe entering the United States in [HTS] category 7306.10 and oil country tubular goods * * *." *Final Scope Det.*, 61 Fed. Reg. at 11,610; *see* Letter from Schagrin to Commerce (Mar. 5, 1992); Pl.'s App., Tab 14, at 2. Based on these letters, Commerce concluded that "petitioners understood that HTS classification of pipe products was based upon the specificity of the category, not actual use, and that dual-certified pipe would be placed in the line pipe category and, thus, excluded from the order." *Final Scope Det.*, 661 Fed. Reg. at 11,610. Accordingly, Commerce stated that, "[i]n keeping with the petition and petitioners' November 19, 1991 letter, the scope language adopted by the Department does not make actual end use a principal consideration in defining the products covered by the investigations." *Id.*

Commerce then noted that the scope language specifically excludes line pipe, without qualification. *Id.* Accordingly, Commerce found that line pipe is excluded from the scope of the order regardless of its actual use. *Id.* Commerce remarked that the scope language emphasizes the exclusion of pipe that "enters the U.S. as line pipe," language suggested by petitioners, and concluded that the physical characteristics and the classification of the merchandise as it passed through U.S. Customs *(i.e.*, "enters the U.S.") were the key factors in determining the scope of the order and not on the disposition of the merchandise at some later point in the stream of commerce. *Id.* at 11,611. Commerce found that this conclusion was supported by the use of the phrase "line pipe of a kind used for oil and gas pipelines" which was taken verbatim from HTS item 7306.10.10. *Id.* Commerce explained that Customs employs the phrase, "of a kind used for" to connote the chief or principal use of a product, not its actual use. *Id.* Accordingly, Commerce concluded that pipe which enters the U.S. as pipe "of a kind used for oil and gas pipelines" is excluded from the scope of the orders. *Id.*

Finally, Commerce pointed out that for purposes of its injury investigations the ITC, in defining the domestic like product (which corresponds to imported class or kind of merchandise), followed the language adopted by Commerce in the notice of initiation. *Id.* Commerce noted that the ITC distinguished line and dual-certified pipe from the subject merchandise in its final determination and did not include producers of line pipe in its definition of the U.S. industry for purposes of its affirmative injury determination. *Id.* (citing *Certain Circular Welded Non-Alloy Steel Pipes and Tubes from Brazil, the Republic of Korea, Mexico, Romania, Taiwan, and Venezuela*, USITC Pub. No. 2564, at I–7–I–13 (Oct. 24, 1992) (final det.) [hereinafter *"ITC Final Det."];* Def.'s Ex. 12, at 9–15. Commerce found that the ITC's "Producers' Questionnaire," however, requested data on the domestic production of pipes "that were single or multiple stenciled to meet *standard pipe specifications*," but

the ITC did not indicate expressly whether or not dual-certified pipe was included in its injury analysis. *Final Scope Det.*, 61 Fed. Reg. at 11,611 (citing ITC Producers' Questionnaire at 14) (emphasis in original). Accordingly, Commerce concluded that "the record with respect to the ITC's treatment of dual-certified pipe is inconclusive, but cannot be read to conflict with the Department's scope language excluding dual-certified pipe."[3] *Id.*

Wheatland challenges Commerce's final scope determination as unsupported by substantial evidence. Wheatland claims that although the petitions and notice of initiation did not mention either line pipe or dual-certified pipe, this omission is not determinative because the focus of the investigation was on standard pipe and neither line pipe nor dual-certified pipe were being imported for standard pipe uses at that time. The court, however, finds this argument unpersuasive as petitioners were aware that line and dual-certified pipe are capable of being used for standard pipe applications, as noted by Commerce.

Wheatland also argues that its letter to Commerce dated November 19, 1991, does not constitute substantial evidence to support Commerce's finding that tariff classification, rather than end use, was dispositively established as a means for defining excluded merchandise. Wheatland asserts that the November 19, 1991 letter demonstrated that the petitioners clearly believed that dual-certified pipe could be classified as standard pipe and expected Commerce to resort to specialized records to identify subject goods. The court, however, disagrees with Wheatland's reading of its letter to Commerce. The letter clearly contemplates the use of tariff classifications as a means of defining the scope of the investigations. The fact that petitioners may have been mistaken in their presumption that dual-certified pipe would enter the United States under the classifications for subject standard pipe, which would be covered by the order, is not within Commerce's discretion to correct by broadening the scope of orders, as Commerce rightly noted. *See id.* at 11,612.

Wheatland further argues that Commerce may not lawfully elevate tariff classification over the predominant method by which the merchandise description identifies the subject merchandise as this conflicts with the petitioners' intention to exclude line pipe entered for line pipe use, not line pipe for standard pipe uses, citing *Torrington Co. v. United States*, 14 CIT 507, 512–13, 745 F. Supp. 718, 722 (1990) ("It is the responsibility of ITA to interpret the term class or kind in such a way as to comply with the mandates of the antidumping laws, not the classification statutes."). The court finds *Torrington* inapposite, however, as Commerce made clear throughout the antidumping investigation and in its final scope determination that the key factors in determining the scope of these investigations were the physical characteristics and the

[3] In fact, the ITC record is not inconclusive on this point. Dual certified pipe information was requested only from domestic producers which manufactured standard pipes. *See ITC Final Det.* at I-12 n.20, I-21 n.48. There is no evidence that the ITC collected data from any domestic industry other than the standard pipe industry. *See* discussion, *infra* p. 19–20.

tariff classifications of the merchandise. *See Final Scope Det.*, 61 Fed. Reg. at 11,611. While Commerce is not required to conform its scope determinations to classification categories as *Torrington* makes clear, use of tariff classifications to define scope is not prohibited and may serve Commerce's purposes, including administrative convenience. As Commerce stated, the exclusion of dual-certified pipe on the basis of tariff classification in the orders is not predicated upon the illustrative list of tariff classifications, but is instead "part of the written description of the scope and is, therefore controlling." *Id.* at 11,612 n.7.

Finally, Wheatland argues that Commerce's final scope determination rests on a characterization of the ITC determination that is not supported by a reading of the determination or the record. Wheatland points out that at the ITC's injury hearing, in response to a specific question as to exclusion of all dual-certified pipe, petitioners' counsel stated that, "[i]t is not our intention to include it if it is used for an API line pipe application." Commerce Scope Recommendation Memorandum from Kuga to Spetrini (Oct. 25, 1993) at 4–5 (quoting ITC Hearing Trans. (prelim.), Inv. Nos. 701–TA–311, 731–TA–532–537, at 45–46 (Oct. 15, 1991)); Pl.'s App., Tab 5. Wheatland further contends that Commerce spliced together two ITC footnotes and falsely conveyed the impression that all dual-certified pipe was excluded from the investigation. Wheatland argues that the ITC's data collection respecting dual-certified pipe was entirely use-based and the ITC record and determination contained no substantial evidence to support Commerce's finding that tariff classification, and not end use, dispositively defined the subject merchandise.

Wheatland, however, ignores Commerce's finding that the ITC final determination clearly distinguishes both line and dual-certified pipe from the pipe subject to the investigations by discussing them in a section entitled "Other Pipe and Tube Products" and noting that line pipe is "produced to meet different specifications than 'standard' pipes, and a large percentage of line pipes are made to larger diameters than the pipes and tubes subject to these investigations." *Final Scope Det.*, 61 Fed. Reg. at 11,611 (quoting ITC Prelim. Det., USITC Pub. No. 2454 (Nov. 1991) at A–9). Commerce found that as the ITC "did not include producers of line pipe in its definition of the U.S. industry for purposes of its affirmative injury determination." *Id.* Commerce stated that the ITC "did not, therefore, examine the impact of imports of line pipe upon the domestic industry." *Id.* (citing ITC Final Det., USITC Pub. No. 2564 (Oct. 1992) at I–7–I–13). Although the ITC collected aggregate domestic shipment data on pipe multiple stenciled to meet standard pipe specifications, it appears that the ITC did so only with respect to domestic producers that also identified that they produced subject standard pipe and there is no evidence that the ITC sought any additional producer shipment data from the remaining domestic producers of line pipe. *Id.* Under these circumstances, Commerce correctly determined that the ITC record does not support a scope finding which would include dual-certified pipe.

A fundamental requirement of both U.S. and international law is that an antidumping duty order must be supported by an ITC determination of material injury covering the merchandise in question. *See* 19 U.S.C. § 1673 (1994). The ITC, in defining like product for purposes of its injury investigations, followed the scope language adopted by Commerce. *See Final Scope Det.*, 61 Fed. Reg. at 11,611. The injury determination of the ITC, thus, covered only products within the original scope of the Commerce investigation. *See United States Steel Group v. United States*, 18 CIT 1190, 1197 n.6, 873 F. Supp. 673, 683 n.6 (1994) (ITC does not have authority to exclude from like product determination merchandise corresponding to that within scope of Commerce investigation). It would follow that any expansion of the scope by Commerce would extend the antidumping duty order beyond the limits of the ITC injury determination and would therefore violate both U.S. and international law.

Given Commerce's finding that the scope of the order is driven by physical characteristics and tariff classification of the merchandise, rather than actual end use, and excludes line pipe without qualification, the court finds that substantial evidence supports Commerce's final scope determination and the determination is in accordance with law.

II. *Minor Alterations Anticircumvention Inquiry:*

As indicated, Commerce seeks a remand to conduct an anticircumvention inquiry. Remand is improper unless Commerce has erred in the determination subject to review. *See Böhler-Uddeholm Corp. v. United States*, No. 96–184, Slip Op. at 12 (Ct. Int'l Trade Nov. 14, 1996) ("Commerce cannot change a decision as a means to implement a new policy."). The importance of finality of determinations prevents amendment of an agency opinion for reasons of policy rather than error. *See id.* Commerce announced its decision to reject the minor alterations anticircumvention petition by letter dated June 7, 1993. Letter to Interested Parties from Lucksinger (June 7, 1993); Pl.'s App., Tab 4. The letter stated that Commerce "has determined that a scope inquiry pursuant to 19 C.F.R. § 353.29(i) is the appropriate action to respond to the issues raised by petitioners." *Id.* at 1. Wheatland claims that this one sentence does not make clear to the parties the underlying basis of Commerce's decision not to initiate an anticircumvention investigation, and thus, cannot form the basis for upholding that decision.

While "[a]n administrative agency, generally, must cite the reasons for its decision in order that the reviewing court may ascertain whether the agency has acted arbitrarily," a court may uphold an agency's decision if the agency's path is reasonably discernible. *NTN Bearing Corp. of America v. United States*, 903 F. Supp. 62, 67 (Ct. Int'l Trade 1995) (citations omitted). The court finds that Commerce's determination that "a scope inquiry pursuant to 19 C.F.R. § 353.29(i) is the appropriate action to respond to the issues raised by the petitioners," was an adequate explanation of Commerce's decision under the facts of this case. *See* Letter to Interested Parties from Lucksinger (June 7, 1993); Pl.'s App., Tab 4, at 1. Implicit in that statement is the fact that when pre-

sented with petitioners' anticircumvention petition, Commerce necessarily observed that "alterations" of subject merchandise, as that term is normally understood, were not at issue. The government acknowledged this fact in its opposition to plaintiff's motion for a preliminary injunction, stating,

> section 1677j(c) is applicable only if the articles in question have been altered in form or appearance in some minor respects. Wheatland does not claim that the line pipe and dual-certified pipe have been altered in form or appearance in some minor respects. Consequently, it is questionable whether section 1677j(c)(1) is even applicable.

Def.'s Mem. in Opp'n to Pl.'s Mot. for Prelim. Inj. at 20. It is undisputed that API 5L and dual-certified API 5L/ASTM A53 pipe are not created by altering the subject merchandise in form or appearance. Standard pipe, such as ASTM A53 pipe, is made to lower specifications than API line pipe and cannot be transformed into line pipe through a minor alteration. Line pipe is a distinct product, produced using different raw materials, manufacture to different chemical, dimensional, and weight specifications, and designed for different uses from standard pipe. *See* Letter from Morrison & Foerster to Commerce (July 19, 1993) at 29; Def.-Intvrs.' App., Tab 13, at 2. In an internal memorandum the Director of the Office of Policy stated that, "Commerce did not initiate an anti-circumvention inquiry, concluding that section 781 Act [sic] did not cover the type of situation described by petitioners."[4] Memorandum from Mueller to Esserman (Feb. 7, 1996), at 3; Pl.'s App., Tab 9, at 4. Moreover, petitioners appear to have acquiesced in Commerce's decision to conduct a scope investigation instead of a minor alterations provision by participating in the scope investigation and not objecting timely to Commerce's failure to conduct an anticircumvention investigation.[5] Consequently, Commerce determined that a scope inquiry, rather than a minor alterations investigation, was warranted. *See* Def.'s Mem. in Opp'n to Pl.'s Mot. for Prelim. Inj. at 21 ("Wheatland well knew that Commerce had decided to conduct a scope inquiry *instead* of an anticircumvention inquiry.") (emphasis added).

Wheatland contends that Commerce erred in failing to conduct a minor alterations anticircumvention investigation after determining that line and dual-stenciled pipe were outside the scope of the antidumping order. Wheatland argues that exclusion under one statutory ground, *i.e.*, scope, does not preclude inclusion under another, *i.e.*, anticircumvention. The minor alterations provision is the third of four parts which

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[4] Even if under some circumstances distinct, not alterable products may be covered by the statute at issue, the facts of this case would still require exclusion from scope. *See* discussion, *infra* p. 23–24.

[5] While Wheatland states that it did not object because it expected Commerce to conduct an anticircumvention investigation if the final scope determination was adverse, Commerce gave no such indication when it began the scope investigation. Commerce's one line response made clear that a scope inquiry was not a first step, but rather the only step to be taken. If Wheatland was misled by *Brass Sheet and Strip from Germany*, 56 Fed. Reg. 65,884 (Dep't Comm. 1991) (final neg. circumvention det.), into believing an anticircumvention proceeding would follow an adverse scope determination, it should have been disabused of this belief by the answer it received here. Even after Wheatland received a favorable preliminary scope determination, it had the obligation to preserve its request for an anticircumvention inquiry if it might have desired one after the final scope determination.

comprise the anticircumvention provisions which Congress added to the antidumping law in the Omnibus Trade and Competitiveness Act of 1988. *See* Section 781(c) of the Tariff Act of 1930 [codified as 19 U.S.C. § 1677j(c)]. The provision states:

> (c) Minor alterations of merchandise
>
> (1) In general
>
> The class or kind of merchandise subject to * * * (B) an antidumping duty order issued under section 1673e of this title * * * shall include articles altered in form or appearance in minor respects * * *, whether or not included in the same tariff classification.
>
> (2) Exception
>
> Paragraph (1) shall not apply with respect to altered merchandise if the administering authority determines that it would be unnecessary to consider the altered merchandise within the scope of the investigation, order, or finding.

19 U.S.C. § 1677j(c) (1994); *see also* 19 C.F.R. § 353.29(g) (1996) (same).

The government argues that the most reasonable interpretation of the plain language of the statute is that, where Commerce deems it necessary, it may "consider within the scope of the order" merchandise which has been "altered in minor respects" so as to fall outside the technical product description. The government claims that any other interpretation would render section 781(c) a nullity and would simply preserve the pre-1988 *status quo* with regard to merchandise altered in only minor respects. Thus, it argues the statute does not preclude an anticircumvention inquiry here.[6]

The government maintains that before 1988, Commerce could clarify, but could not alter the scope of antidumping duty orders. *See, e.g., Royal Business Machines, Inc. v. United States*, 1 CIT 80, 86–87, 507 F. Supp. 1007, 1013 (1980) (neither Commerce nor Customs can legally change results of LTFV and injury determinations); *Smith Corona Corp. v. United States*, 915 F.2d 683, 686 (Fed. Cir. 1990) ("Although the scope of a final order may be clarified, it cannot be changed in a way contrary to its terms."). The government claims that Commerce's inability to change the scope of an antidumping duty order led to criticism that the antidumping laws were ineffective and permitted circumvention through slight modification of exports to remove products from the scope of existing antidumping duty orders. *See* H.R. Rep. 40, 100th Cong., 1st Sess., pt. 1, at 135 (1987) [hereinafter "House Report"]. Consequently, the government claims that Congress amended the antidumping laws in 1988, adding section 781 to prevent circumvention of antidumping duty orders.

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[6] The government, however, apparently only changed its mind from its initial view of the application of the statute here, after receiving Congressional inquiries. *See* Letter from Congressman Borski to Undersecretary of Commerce Eizenstat (Apr. 29, 1996), Def.-Intvrs.' App., Tab 24. This may bespeak a policy change, rather than simple error correction. The court need not, however, resolve what changed Commerce's mind. It need only determine whether error occurred.

The government claims that this legislation was highly controversial, with petitioners arguing that respondents were using technical product descriptions to evade antidumping duties and respondents arguing that petitioners would exploit unfairly any flexibility regarding the scope of antidumping duty orders by expanding their scope beyond the products covered by the injury determination. As a result of these opposing views, the government claims that Commerce has been "extremely cautious in applying the provisions" and has applied the minor alterations provisions in only two prior decisions. *See Electrical Conductor Aluminum Redraw Rod from Venezuela*, 56 Fed. Reg. 42,310 (Dep't Comm. 1991) (final affirm. scope ruling) (Commerce concluded electrical conductor aluminum redraw wire was within scope of order on redraw rod where wire was produced by passing redraw rod through wire drawing mill); *Brass Sheet and Strip from Germany*, 56 Fed. Reg. 65,884 (Dep't Comm. 1991) (final neg. circumvention det.) (Commerce determined that imports of 667 series brass were not circumventing order on 200 series brass as respondent was not altering 200 series brass, but producing different type of brass, the 667 series).

Although the government admits that the issue is not free from doubt, it concludes that the better interpretation of sections 781(c)(1) and (2) is that they would permit, in appropriate circumstances, the application of antidumping duties to merchandise not technically within the scope of the order, but which, from the standpoint of a practical business person, is in the same stream of exports for which the order was issued, *i.e.*, essentially the same merchandise going to essentially the same customer for essentially the same purpose. The government argues that such a carefully disciplined application of sections 781(c)(1) and (2) would not exceed the reach of the injury determination and would, therefore, remain a valid application of antidumping duties.

Furthermore, the government asserts that the legislative history demonstrates that the House and the Senate held different views with regard to the effect of section 781(c), with the Senate taking a more expansive view than the House. For example, the government points out that the Senate Report reads, "[n]ew sections are added to current law * * * to allow the Department of Commerce to *expand* the scope of antidumping and countervailing duty orders to prevent circumvention and diversion." S. Rep. No. 71, 100th Cong., 1st Sess. 96 (1987) [hereinafter "Senate Report"] (emphasis added). In the government's view, the House appears to have taken a more restrictive view of the minor alterations provision so as to only include within the coverage of the antidumping order products that were modified in such minor ways that they would have been covered under the pre-1988 law. The House Conference Report states that:

> [T]he anticircumvention provisions are intended to address efforts to import the *same class or kind* of merchandise in slightly modified form and should typically fall within the ITC's prior finding of injury.

H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 602–03 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1635–36 [hereinafter "Conference Report"] (emphasis added). Furthermore, the House Report indicates that the purpose of the minor alterations anticircumvention provision is to determine "whether an alteration results in a change in the class or kind of merchandise, and is therefore no longer a minor alteration." House Report at 135.

The legislative history provides three examples of the types of minor alterations that the provision is intended to cover. First, steel sheet that has been tempered or rolled prior to importation would be considered to have been altered within the meaning of section 1677j(c) and within the scope or an antidumping duty order covering steel sheet. *See* House Report at 135. Second, an order covering cookware would be interpreted under the minor alterations provision to reach cookware with a fire resistant coating which is applied prior to importation. *See id.* Third, an order covering portable electric typewriters would reach typewriters with a calculator or memory feature. *See* Senate Report at 101. The Senate explained that:

> An important purpose of this provision is to avoid results such as the one reached by the Commerce Department in a case involving portable electric typewriters from Japan, where a minor alteration resulted in portable typewriters with calculator or memory features being excluded from the scope of an existing antidumping order on portable typewriters. The Committee intends this provision to prevent foreign producers from circumventing existing findings or orders through the sale of later developed products or of products with minor alterations that contain features or technologies not in use in the class or kind of merchandise imported into the United States at the time of the original investigation. Such later developments or minor alterations would not result in the exemption of the imported merchandise from the finding or order, unless the Commerce Department finds it unnecessary to include such products in the finding or order.

Id.

Given the ambiguity in the statute and the conflicting legislative history, the government claims that Commerce's interpretation of the statute, allowing the minor alterations provision to be applied in the present case, is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). Applying Commerce's interpretation of the statute to this case, the government argues that a serious question is raised as to whether standard pipe may have circumvented the order in a manner which the antidumping law's traditional scope provisions were not equipped to address and which the new anticircumvention provisions were designed to cover. Accordingly, the government contends that Commerce must determine that whether the allegedly altered merchandise has been "altered in form and appearance in minor respects" by employing "practical measurements" to determine whether the merchandise has undergone a minor alteration.

See Senate Report at 100. Commerce would consider such factors as, "the overall characteristics of the merchandise, the expectations of the ultimate users, the use of the merchandise, the channels of marketing, and the cost of any modification relative to the total value of the imported product." *Id.* In order to make this determination, the government requests a remand so that Commerce may review much of this information about standard pipe as well as line and dual-certified pipe which has already been obtained, and request any additional necessary information.

In the court's view, however, the intent of Congress is clear and the statutory language is unambiguous, applying only to merchandise that has been "*altered in form or appearance in minor respects*" from that which appears to have been originally within the scope of the antidumping order. The transformation contemplated by the statute is from a product that is arguably within the scope of an order to a product that is claimed to be outside the scope of the order because of a minor physical alteration. The minor alterations provision does not apply to a distinct product that is originally unambiguously outside the scope of the order and is not produced by altering subject merchandise. Accordingly, Commerce's interpretation is not entitled to *Chevron* deference as Congress' intention is clearly expressed by the plain language of the statute. *See Chevron*, 467 U.S. at 842–43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

This meaning of the scope and application of section 781(c) is the only one which comports with the language and the legislative history of the statute. The court finds no basis to support the government's assertion of conflicting legislative views on the purpose of the minor alterations provision nor any support for the government's contention that one purpose of the legislation was to overturn established judicial precedent concerning the limits on Commerce's authority to interpret the scope of an order.[7] One would have expected Congress to be quite clear if it wished to take the law in a different direction in this area, from the direction traveled by the courts. *See, e.g.*, H.R. Rep. No. 1015, 98th Cong., 2d Sess. 68 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4960, 5027 (citing *United States v. Heraeus-Amersil, Inc.*, 671 F.2d 1356 (C.C.P.A. 1982), as the court decision sought to be overturned by the legislation). Here, the Conference Report states that although under present law there is "[n]o specific [statutory] provision" governing minor alterations, "[u]nder current practice, Commerce includes within the scope of an antidumping or countervailing duty order or finding merchandise which has been altered in minor respects from the merchandise originally investigated." Conference Report at 600. Accordingly, the purpose of this amendment was to codify Commerce's current practice with regard to minor alterations, by clarifying that the scope of orders could cover such

[7] Even if there were such a conflict in the original legislative reports the Conference Report, which is clear, would control.

cases. *See* Senate Report at 99 (cited by government as supporting its view, which states that the bill "adds a new section 780(b) to the Tariff Act of 1930 to *clarify* the scope of an antidumping or countervailing duty order.") (emphasis added). Accordingly, there was no intent to overturn court precedent or general Commerce practice.[8]

Finally, in the present case, Commerce determined that line and dual-certified pipe were clearly excluded from the scope of the antidumping duty order. Under section 1677j(c)(2),

> Paragraph (1) shall not apply with respect to altered merchandise if the administering authority determines that it would be unnecessary to consider the altered merchandise within the scope of the investigation, order, or finding.

19 U.S.C. § 1677j(c)(2). As Commerce has made a final determination that the alleged "altered merchandise," namely line and dual-certified pipe, is clearly excluded from the scope of the antidumping duty orders in effect on standard pipe, section 781(c)(1) "shall not apply," as it is unnecessary for Commerce to include the "altered" merchandise to protect the antidumping duty order. The contrary interpretation sought by plaintiffs and defendant (at least in this case) would allow expansion of the order well beyond its original scope and that of the ITC injury determination and could cause a conflict with GATT requirements of an injury determination. There is no indication Congress wished to create such a conflict. In fact, the statutory scheme indicates just the opposite. Of the four anticircumvention provisions, the minor alterations provision is the only provision which does not require Commerce to notify the ITC before making a scope determination. *See* Conference Report at 601–04 (ITC advice). The legislative history provides with respect to the other three provisions that,

> The purpose of this provision authorizing ITC injury advice is to ensure that any anti-circumvention action taken is consistent with U.S. international obligations. * * *
>
> It is the expectation of the conferees that findings by the ITC that the inclusion of the merchandise is inconsistent with the prior injury determination would be relatively unusual, since the anti-circumvention provisions are intended to address efforts to import the same class or kind of merchandise in slightly modified form and should typically fall within the ITC's prior finding of injury.

Id. at 602–03. Congress obviously contemplated that the minor "alterations" would be so minor that conflict with ITC injury determinations would not be an issue. The words of the statute are sufficiently clear. They indicate that Congress wished to permit and even favor certain kinds of scope clarifications. Congress did not approve, through the mi-

[8] Although the Senate Report also indicated that an important purpose of the minor alterations provision is to "avoid results such as the one reached by the Commerce Department in a case involving portable electric typewriters from Japan," it is not clear from Commerce's determination or the Senate Report whether that case actually involved a minor alteration or, rather, a later developed product, for which another statutory provision exists. *See* Senate Report at 101; *see also* 19 U.S.C. § 1677j(d) (covering later-developed merchandise). In any case, even if the relevant provision was addressed, Congress did not disavow Commerce's general practice, rather it rejected what may have been an aberrant result.

nor alterations provision, wholesale changes to the scope of orders. As each stage of unfair trade proceeding builds on the last, such changes are intolerable.[9] Royal Bus. Machines, 1 CIT at 87, 507 F. Supp. at 1014 ("Each stage of the statutory proceeding maintains the scope passed on from the previous stage.").

As the statute is unambiguous and applies only to merchandise arguably within the scope of the antidumping duty order which is altered to be outside the order, the minor alterations provision does not apply to the present case. Here, the merchandise at issue was always known to the parties, was discussed in respect to several rulings on scope and clearly was not included within the scope of the order. Accordingly, Commerce did not err in declining to perform an anticircumvention investigation. As no explanation by Commerce could alter the result under the statute, remand is unnecessary. Plaintiff's and government's request for a remand is denied and the final scope determination of the Department of Commerce is affirmed.

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[9] Petitioners usually desire to define the subject class of imported merchandise in such a way as to obtain an order which is of maximum breadth. Petitioners, however would not want to define the class of merchandise so broadly that the corresponding domestic industry would include a substantial number of uninjured components. This might result in a negative ITC injury determination. While the parties do not argue that this would have been the case here if the original product description was as petitioner now wish it to be, this is a serious consideration for purposes of interpretation of the statute. When a class of merchandise already exists and is well known to the parties, the minor alterations provision should not allow a petitioner to broaden the scope of an order in a way which petitioner avoided at the outset. *See, e.g., Encon Indus., Inc. v. United States*, 16 CIT 840, 842 (1992) (importer attempt to avoid effects of unchallenged like product determination rejected); *United States Steel Group*, 18 CIT at 1197, 873 F. Supp. at 683 (petitioners desirous of including certain Korean imports within scope of order defined domestic like product in a way which resulted in negative determination).

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C97/66 7/16/97 Wallach, J.	Hi-Tec Sports, U.S.A.	92–10–00717	6404.19.20 37.5%	Men's Class V Nylon boots (article 4130) 6403.91.60 8.5% Women's Class V Nylon boots (article 4140) 6403.91.90 10%	Hi-Tec Sports U.S.A. *v.* the United States, Slip Opinions 96–139 and 97–24	San Francisco Men's (Article 4130) and women's (Article 4140) Class V Nylon style hiking boots
C97/67 7/16/97 Wallach, J.	Hi-Tec Sports, U.S.A.	92–11–01412	6404.19.15 10.5%	Gannett Peak II and Rainier II 6403.91.60 8.5% Lady Gannett Peak II and Lady Rainier II 6403.91.90 10%	Hi-Tec Sports U.S.A. *v.* the United States, Slip Opinions 96–139 and 97–24	San Francisco Hiking boots: Gannett Peak II; Rainier II; Lady Gannett Peak II and Lady Rainier II

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